A TREATISE

ON

THE LAW

OF

PRIVATE CORPORATIONS.

BY

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PREFACE.

The purpose of the author in preparing this treatise was to furnish the student and the profession with an exposition and illustration of the law as it now exists relating to private corporations, and especially those corporations created for pecuniary emolument.

He hopes, especially, that his classification of topics and method of treatment of the subject will commend the work to the practitioner.

It is perhaps unnecessary to remind the profession that the jurisprudence relating to this subject is largely the growth of recent times. This fact seems to be fully appreciated by Mr. Justice MILLER of the Supreme Court of the United States. In a recent case before that court he observes: "The subject of the powers, duties, rights and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated. They have entered so extensively into the business of the country, the most important part of which has been carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the capital and energy required to conduct

these large operations, is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized and enlarged as to constitute a branch of jurisprudence, with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time."

The author has endeavored to state and illustrate the general principles of the law relating to private corporations, and some of the more important topics, that have heretofore received but little or no attention from authors, have been fully discussed, and even elaborately considered by him.

That the treatise will entirely supersede other works on the subject is not anticipated; but the author hopes that it will be found useful, if not necessary to the practitioner, and to possess merits to commend it to the profession generally. If it shall be found convenient to those actively engaged in professional labors, in their investigations of the law relating to the various questions therein discussed, the principal aim of the author will be realized and his ambition satisfied. G. W. FIELD.

ALBANY, *December* 1, 1877.

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name one body or legal person; endowed with certain rights, varying, according to the object of its constitution; and its acts, when done in pursuance of the powers conferred upon it by law, are considered those of the body, and not those of the members composing it.

If it consists of one member only, it is denominated a sole cor poration, if of more than one, an aggregate corporation. The members may not only consist of natural persons, but of other corporations and of partnerships; and it does not lose its legal identity by any change of its members during its legal existence.

Mr. DILLON has described them briefly, but with great accuracy and perspicuity, as follows: "A corporation is a legal institution devised to confer upon individuals of which it is composed, powers, privileges and immunities, which they would not otherwise possess; the most important of which are continuous legal identity, and perpetual or indefinite succession under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members of the corporation." [1]

Mr. KYD has described them, though not with entire accuracy, as follows: "A corporation or body politic or body corporate, is a collection of many individuals united in one body, under a special denomination; having perpetual succession under an artificial form, and vested by the policy of the law with a capacity of acting in several respects as an individual; particularly, of taking and granting property, contracting obligations, and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." [2]

The language of Chief Justice MARSHALL, in the celebrated Dartmouth College case, describing a corporation, is admired "for

[1] 1 Dill. on Mun. Corp., § 8. For further description see Ang. & Am. on Corp., § 11; 1 Brown's Civ. L. 141; 2 Kent's Com. 267.

[2] 1 Kyd on Corp. 13. In a recent case, the supreme court of the United States has intimated, that the earlier definitions of a corporation were not satisfactory; and that a company organized in England, under an act of parliament, with the incidents of a corporation, may in this country be treated as such, though it is expressly provided by the act, that such companies should not be so considered. Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

its general accuracy and felicitous expression;" but in some respects it is defective as a definition or description of a corporation. He says: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it is created. Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies — the hazardous and endless necessity of perpetual conveyances, for the purposes of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object, like one immortal being."[1]

SEC. 2. **Various kinds of corporations.** — The definitions and descriptions we have given apply to corporations generally; but there are various kinds of corporations created for different purposes, and the franchises and powers of each class are limited to the purposes of the creation of each kind. Thus they are divided into sole and aggregate. A sole corporation consists of a single individual, as a member or representative of it. Of this class in the institution of the English church are the ecclesiastics, known as bishops, deans, parsons and vicars, who possess certain temporal rights and franchises, and whose successors continue to enjoy the same rights as a sole corporation.[2]

[1] Dartmouth College v. Woodworth, 4 Wheat. 636.

Blackstone observes, that, "as all personal rights die with the person, and as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public, to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality." 1 Bl. Com. 467.

[2] Bl. Com. 469; Bac. Abr., tit. Corp. If a parson holds his possession singly

The king is considered a sole corporation, and his successors enjoy the same franchises by virtue of this sole corporation which he constitutes.[1] It is in this sense that the king never dies.

It is claimed that sole corporations are an invention of the English law, as they are unknown as original institutions to the civil law, from which most of the law relating to corporations is derived. The familiar maxim of the Roman law was *tres faciunt collegium*. But it was a doctrine of the civil law that if a corporation, originally consisting of three persons, was reduced to one, "*se universitus ad unam redit*," it might still exist as a corporation, "*et stat nomen universitatus*."[2] There are few principles of the general law of corporations applicable to sole corporations.[3] But we shall hereafter notice statutes of various states providing for the incorporation of a single person for pecuniary gain under general laws of incorporation, and call attention to the fact, that an individual may become entitled to the rights and franchises of a corporation aggregate, by purchase of the same on a sale thereof on execution against the corporation, or on a sale made under a power contained in a deed of trust, executed by the corporation.[4] We have said that aggregate corporations

he is a corporation sole; but if with others, he makes a chapter, and is a member of a corporation aggregate. Id.; Wats. Comp. Incumb. 372. In those states of the Union where the religious establishment of the Church of England was adopted when they were colonies, together with the common law on that subject, the minister of the parish was seized of the freehold as *persona ecclesiæ*, in the same manner as in England; the right of his successor being thus established was not divested by the change in the government. The Town of Pawlet *v.* Clark, 9 Cranch, 292. In England the freehold of the churchyard, parsonage-house, the glebe and the tithes of the parish, were vested in the parson as a sole corporation. 1 Bl. Com. 469. The king, as well as parliament, is a sole corporation. The case of Sutton's Hospital, 10 R. 29, b; 1 Shepard's Abr. 431.

[1] 1 Bl. Com. 470; Bac. Abr., tit. Corp. The king is made a sole corporation in order to prevent an *interregnum* or vacancy of the throne. 1 Bl. Com. 470.

[2] 1 Bl. Com. 469.

[3] 1 Wood. Lect. 471; 2 Kent's Com. 307.

[4] It is sometimes provided by statute that the franchise of a corporation may be levied upon and sold under an execution, the purchaser becoming vested with all the powers of the corporation. Iowa Code (1873), § 1086; see also, as to the authority of a single individual to entitle himself to the advantages of a corporation aggregate; Iowa Code (1873), § 1088; see, also, *post*, ch. 15. In Overseers, etc., *v.* Sears, 22 Pick. 125, it was said: "We are not aware that there is any instance of a sole corporation in this commonwealth, except that of a parson, who may be seized of parsonage lands, to hold to him and his successors in the same office in right of his parish."

consist of two or more persons, although the civil law required at least three persons to constitute a corporation. Of the class denominated aggregate corporations are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church, and most of the corporations both public and private in this country. Another division of corporations is into ecclesiastical and lay. In the former the persons comprising them and the objects for which they are constituted are spiritual or religious, and they embrace all such corporations as are organized under general statutes of the various states, providing for the incorporation of religious societies. Again, lay corporations are divided into two kinds, eleemosynary and civil. Eleemosynary corporations embrace all such as are constituted for the perpetual distribution of the arms and bounty of the founder, such as hospitals, colleges and academies.[1] Again, civil corporations are divided into public and private. Public corporations are such as are created for political purposes, and embrace all such as come under the denomination of municipal corporations, as counties, cities, towns and villages.[2]

Private corporations are such as are created for a variety of temporal purposes, and for pecuniary gain to the members composing it, and embrace such as are created for banking, insurance, railroad, canal, bridge, turnpike, manufacturing, building, and for other commercial and business purposes, for the personal gain and emolument of its members.

SEC. 3 **Distinction between public and private corporations.** — As we propose to consider and illustrate the law applicable to private corporations only, it may be proper to consider the distinction as to membership between the two great and most common divisions of corporations, viz.: public and private corporations. In public corporations, membership consists only in residence within the territorial limits of the corporation. A citizen, for instance, of a county, city, town, or village, duly incorporated, is a member of such corporation; and it is not necessary, as with private corporations, that the members or citizens constituting it should, in any manner, accept of the charter or statute creating the same. On

[1] 1 Bl. Com. 471.

[2] 2 Kent's Com. 275.

the other hand, membership in private corporations can, originally, only be created by accepting of the provisions of the charter tendered to them, or voluntarily organizing under the provisions of the statutes providing for incorporation, or complying with the provisions of the general statute of the state in relation thereto.[1] And it has been held, that a corporation is private as distinguished from public, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power.[2]

This distinction between private and public corporations is stated by Mr. Dillon as follows: "Private corporations are created for private purposes, as distinguished from governmental purposes; and they are not in the contemplation of law, public, because it may have been supposed by the legislature that their establishment would promote either directly or consequentially the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative. But when assented to, the legislative act is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation; unless the right to do so was reserved at the time. * * * Public corporations are called into being at the pleasure of the state, and while the state may, it need not obtain the consent of the people of the locality to be affected. The character of a municipal corporation is in no sense a contract between the state and the corporation, although, as we shall see, private or vested rights in favor of third persons, if not in favor of the corporation, may arise under it. Public corporations, within the meaning of this rule, are such as are established for public purposes exclusively — that is, for purposes connected with the administration of civil or local government; and corporations are public only when, in the language of Chief-Justice MARSHALL, 'the whole interests and franchises are the exclusive property and domain of the government itself.'"[3]

[1] Overseers of Poor, etc., *v.* Sears, 22 Pick. 122; Oakes *v.* Hill, 10 id. 333; 1 Dill. on Corp., § 19.

[2] Rundle *v.* Delaware & Raritan Canal Co., 1 Wall., Jr., 275. But a corporation is not necessarily public because it is of general public interest. Ten Eyck *v.* Delaware & Raritan Canal Co., 18 N. J. L. 200; Tinsman *v.* Belvidere, etc., R. R. Co., 26 id. 148.

[3] 1 Dill. on Mun. Corp., §§ 29, 30; *post*, ch. 3.

SEC. 4. **Quasi corporations.** —There is a class of joint-stock associations, organized for private pecuniary purposes, under special statutes, that possess some of the powers and attributes, or common law incidents of corporations, and may be designated as *quasi corporations.* Provision was made, for these limited or qualified partnerships, in France, as early as 1673, by an ordinance, *la société en commandite*, by which one or more special or silent partners might furnish a certain portion of capital to be used in the partnership affairs, and only be liable to the extent of the funds thus furnished.[1] It is believed that similar statutory enactments may be found in most of the states of Europe, as well as of the Union; and the members of such partnerships or joint-stock associations, in respect to their personal liability for the debts of the association, are placed on the same footing as corporators. The condition required in such cases, in order to exempt from unlimited liability, is the recording in some public office, or the publication in some manner, of a statement or certificate of the terms and conditions of the copartnership, and of the extent or limit of liability of the partners.[2] An English act of parliament also permitted the secretary of a commercial joint-stock partnership to sue and be sued as a representative of the company, and allowed members of the same to sue the company.[3] This was conferring upon a partnership an additional corporate quality, that otherwise it would not possess; and a recent English act,[4] among other things, provides that the separate property of the members of such companies as shall be organized under it, shall be liable to the satisfaction of judgments obtained against such company, only after due diligence has been used to obtain satisfaction out of the property of the company.

SEC. 5. **Origin and early history of private corporations.** — The origin of private corporations is hidden in the obscurity of

[1] Ang. & Am. on Corp., § 42. See, also, as to more recent provisions of the French Code, Répertoire de Jurisprudence par Merlin, tit. Société, art. 2, Code de Com., b. 1, tit. 3, § 1.

[2] Iowa Code (1873), chap. 9.

[3] See history of early English legislation on this subject, opinion of Lord Chan. ELDON in Van Sandau v. Moore, 1 Russ. Ch. 441. See, also, 2 Bell Com., B. 7, ch. 2, p 627, *et seq.;* Story on Part., § 77 and notes; 25 and 26 Vict., c. 89; "The Companies' Act, 1862;" 30 and 31 Vict., c. 131; "The Companies' Act, 1868," regulating joint-stock companies.

[4] 7 and 8 Vict., c. 110.

the remote past.[1] They probably existed in Greece in the age of Solon, the law-giver, as his laws provided for the institution of private corporations, on condition of subjection, and obedience to the laws of the state.[2]

They also existed in Rome at an early period in the history of the Republic; authority being conferred by the Twelve Tables to private companies, to make by-laws, not inconsistent with the public law;[3] which provision, it has been claimed, was copied from the laws of Greece. The probability, that the Roman idea of corporate institutions was obtained from the Grecians, is perhaps increased by the fact, that Rome obtained much of her literature, philosophy, and fine arts, as well as jurisprudence from Greece.

SEC. 6. **History of banking corporations.** — The necessities of a commercial and maritime people would naturally suggest the advantage of banks and the business of banking. Indeed, banking has been found almost, if not quite, indispensable to all civilized nations; and it is not at all surprising that the earliest chartered institutions should be for banking purposes.[4]

[1] "It is a cruel mortification, in searching for what is instructive in the history of past time, to find that the exploits of conquerors who have desolated the earth, and the freaks of tyrants who have rendered nations unhappy, are recorded with minute and often disgusting accuracy; while the discovery of useful arts and the progress of the most beneficial branches of commerce are passed over in silence and suffered to sink into oblivion." Robt. Hist. Disq. on India, (Am. ed.) p. 50.

[2] Ayliffe's Treat. on Civ. L. 197; Dig. 47, 22, 4; 2 Kent's Com. 268.

[3] Table 8; Plut. Life of Numa.

[4] "The term 'bank' in reference to commerce, implies a place of deposit of money. Banks, like most commercial institutions, originated in Italy, where, in the infancy of European commerce, the Jews were wont to assemble in the market places of the principal towns, seated on benches ready to lend money; and the term "banks" is derived from the Italian word, *banco* (bench). Banks are of three kinds, viz.: of deposit, of discount, of circulation. In some cases all these functions are exercised by the same establishment; sometimes two of them; and, in other instances, only one.

"1. A bank of deposit receives money to keep for the depositor until he draws it out. This is the first and most obvious purpose of these institutions. The goldsmiths of London were formerly bankers of this description; they took the money, bullion, plate, etc., of depositors merely for safe-keeping.

"2. Another branch of the banking business is the discounting of promissory notes and bills of exchange, or loaning money upon mortgages, pawn or other security.

"3. A bank of circulation issues bills or notes of its own, intended to be the circulating currency or medium of exchanges, instead of gold and silver." 1 Ency. Am., p. 543.

A more accurate etymology is said to be that which derives the word from the Italian word *monte* (Latin *mons*), a mound, heap or bank. Webster says:

The earliest operations of individuals or associations, in money or exchange, or in the business of banking, were undoubtedly very limited and crude, compared to the banking business of the present time. The Jewish money changers pursued the employment, to a limited extent, in Jerusalem — invading the temple for that purpose;[1] and during the middle ages, carried on an extensive business of private banking in Lombardy, and in the maritime states of Italy and of continental Europe, and subsequently in London.[2]

At Athens, also, in the days of Demosthenes, private bankers, it seems, pursued the business of exchanging foreign money, receiving deposits at interest and loaning money;[3] and banking

" It may be observed that the buying and selling of bills of exchange is among the most important functions performed by banks in modern times. As to the word 'bank,' it has been claimed that its meaning and origin in commerce was derived from analogy with another meaning, viz.: earth heaped up — a pile of earth — a bench of earth — as in the banks of commerce, money was brought together by many parties and piled up, making a bank." See Web. Dic.

[1] Matthew, xxv: 27.

[2] Robertson's Hist. Charles V, vol. 1, p. 257; Anderson's Hist. Com., vol. 2, p. 192. Mr. Gilbart, in his History and Principles of Banking, says: "We have but little information as to what kind of banks existed in the earlier ages, or on what system they conducted their business. As most of the nations of antiquity subsisted chiefly on agriculture, they probably had little occasion for banks; for it is only in commercial countries that these institutions have attained to any high degree of prosperity. And, as even the commercial nations of antiquity were unacquainted with joint-stock companies or commercial corporations, and had not discovered the use of paper money or bills of exchange, the business of a banker, even among them, must have been somewhat different from that of a banker of the present day. The merchants of those early times employed as money, gold and silver bullion; and received it and paid it away, by weight. It is probable that the merchants would require that the precious metals they received should be of a certain degree of fineness. We read of Abraham weighing unto Ephron 400 shekels of silver, current money with the merchant, a phrase which implies that the money current with the merchant, was different from that in common use."

[3] Mr. Mitford, in his history of Greece, observes: "In the general insecurity of property in the early ages, and especially in Greece, it was highly desirable to convert all that could be spared from immediate use into that which might more easily be removed from approaching danger. By a compact understood among men, with this view, the precious metals appear to have obtained their early estimation. Gold and silver, then, having obtained their certain value as signs of wealth, a deposit secure against the dangers continually threatening, not individuals only, but every town and state in Greece, would be a great object of the wealthy. Such security was offered nowhere in equal amount as in those temples, which belonged not to any single state, but were respected by the common religion of the nation. The priesthood, not likely to refuse the charge, would have a large interest in acquiring the reputation of fidelity to it. Thus, Delphi appears to have become the great bank of Greece, perhaps before Homer, in whose time its riches seem to have been already proverbial. Such, then, was found the

systems were inaugurated by the Romans as early as the fourth century.[1]

value of this institution, that when the Dorian conquerors drove so large a part of the Greek nation into exile, the fugitives who acquired new settlements in Asia, established their own national bank in the manner of that of their former country, recommending it to the protection of the same divinity. The Temple of Apollo, at Branchidæ, became the great depository of the wealth of Ionia." Mit. Hist. Greece, vol. 1, p. 187.

In connection with this subject, Mr. Gilbart observes: "Afterward, the Temple of Olympia, like that of Delphi, became an advantageous repository for treasure. But, although the temples discharged one of the offices of the banks, by being places of security, yet, as they did not grant interest on money deposited, they did not supersede banks of deposit established by private individuals. At Athens, especially, banking was a flourishing trade."

Mr. Mitford (Hist. of Greece, vol. 4, p. 22), further observes: "The interest of money, it appears, was enormous at Athens, an unavoidable consequence of the wretched insecurity of person and property. Throughout modern Europe land is, of all property, esteemed the safest source of income, but in Greece it was held that the surest return was from money lent at interest. For in the multiplied division of Greece into small republics, with very narrow territories, the produce of land was continually destroyed by an invading enemy, but a moneyed fortune, according to Xenophon's observation, was safe within the city walls. In proportion, then, to the interest of money, and the security of all things, the profits of trade will always be high, and thus numbers would be induced to borrow, even at a high rate of interest. Xenophon, therefore, proposed, by lending from the public stock, and encouraging commercial adventure by just regulations, to raise a great revenue, and by the same means, instead of oppressing to enrich individuals. As a corollary, then, to this project, when the amount of the subscription or its profits might allow, he proposed to improve the ports at Athens, to form wharves and docks, to erect halls, exchanges, warehouses, market-houses and inns; for all which tolls and rents should be paid; and to build ships to be let to merchants. Thus, while numbers of individuals were encouraged and enabled to employ themselves for their private benefits, the whole Athenian people would become one great banking company, from whose profits every member, it was expected, would derive at least an easy livelihood."

[1] Anderson's Hist. of Com., vol. 1, p. 156.

Relating to Roman banks and bankers, at an early age in her history, Mr. Gilbart, in his History and Principles of Banking, further says: "At Rome the bankers were called *Argentarii*, *Mensarii*, *Numularii*, or *Collybistæ*. The banking houses were called *Tabernæ*, *Argentariæ*, or *Mensæ*, *Numulariæ*. Some of these bankers were appointed by the government to receive the taxes; others carried on business on their own account. This mode of transacting business was somewhat similar to that which is in use in modern times. Into these houses, the state or men of wealth, caused their revenues to be paid, and they settled their accounts with their creditors by giving a draft or cheque on the bank. If the creditor, also, had an account at the same bank, the account was settled by an order to make the transfer of so much money from one name to another. To assign over money or to pay money by draft, was called *prescribere*, and *rescribere*; the assignment or draft was called *attributio*. These bankers too were money changers. They also lent money on interest, and allowed a lower rate of interest on money deposited in their hands. In a country where commerce was looked upon with contempt, banking could not be deemed very respectable. Among most of the ancient agricultural nations, there was a prejudice against the taking of interest for the loan of money. Hence the private bankers at Rome were sometimes held in disrepute, though those

After the middle ages Florence and Venice became cities of most important commercial and monetary transactions. The private bankers of Florence, in 1430, had become so wealthy as to be able to loan the state 4,865,000 gold florins at one time.[1] The spirit of commercial and maritime enterprise, which manifested itself in Italy as early as the eleventh century, required more extensive banking facilities than were previously enjoyed, and this naturally suggested the association and co-operation of private bankers.

The first public bank of which we have any account was instituted about the year 1157 at Venice, for the purpose of assisting the state in some financial difficulties, and to carry out a plan for a forced loan from wealthy citizens. The state promised to pay

whom the government had established as public cashiers or receivers-general, as we may term them, held so exalted a rank that some of them became consuls."

[1] In relation to banking by the Florentines after the middle ages, Mr. Robertson, in his disquisition on India (page 113), says: "As the Florentines did not possess any commodious seaport, their active exertions were directed chiefly toward the improvement of their mannufactures and domestic industry. About the beginning of the fourteenth century, the Florentine manufacturers of various kinds, particularly those of silk and woolen cloth, appear from the enumeration of a well-informed historian, to have been very considerable. The connections which they formed in various parts of Europe, by furnishing them with the productions of their own industry, led them to engage in another branch of trade, that of banking. In this they soon became so eminent, that the money transactions of almost every kingdom of Europe passed through their hands, and in many of them they were intrusted with the collection and administration of the public revenues.

In consequence of the activity and success with which they conducted their manufactures and money transactions — the former always attended with certain though moderate profits, the latter lucrative in a high degree — at a period when neither the interest of money nor the premium on bills of exchange was settled with accuracy, Florence became one of the first cities in christendom, and some of its citizens extremely opulent."

Blackstone, in considering the king's revenues, and the application of the same to the payment of interest on the public debt of England, largely increased by foreign wars on the continent; and the impolicy of levying taxes sufficient to pay the same in any one year, observes: "It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than sufficed to pay the annual interest of the sums so borrowed; by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity.

"A system which seems to have had its origin in the state of Florence, A. D. 1344; which government then owed about 60,000*l.* sterling; and being unable to pay it, formed the principal into an aggregate sum, called metaphorically, a mount or bank; the shares whereof were transferable like our stocks, with interest of five per cent; the prices varying according to the exigencies of the state." 1 Bl. Com. 326, 327.

for the loan interest at the rate of four per cent; the stock of the bank was made transferable, and a body of commissioners called a Chamber of Loans, *Camera degli Imprestiti*, was appointed to manage the transfer of stocks and the payment of interest. This institution originally possessed few features of a regular bank. But Venice was the center of a vast commerce during the crusades, and its franchises were gradually extended by royal favor, until it performed the usual functions of a modern banking institution, except perhaps the discounting of bills and notes. At any rate, the institution as finally perfected, about 1171, and known as "The Bank of Venice," became a model for subsequent banking institutions throughout Europe, and continued to prosper until the fall of the republic in 1798, a remarkable instance of a corporate longevity.[1]

Other corporate banks were soon after created in Italy and

[1] Ency. Am., vol. 1, tit. Bank; Zell's Ency., tit. Banking; Ed. Ency. 217. The Bank of Venice was established as early as 1171, during the crusades, and for the purpose of rendering assistance to those expeditions. It was a bank of deposit only, and strictly a public bank; as the government became responsible for the deposits, and the whole capital was, in effect, a public loan, the funds of the bank being made use of by the government; and, in the early periods of the operations of this bank, they were not withdrawn when once deposited, but the depositor had credit at the bank to the amount deposited and used the money so deposited by transferring this credit to another person instead of paying money. Subsequently, however, the deposits were allowed to be withdrawn; for though the bank credits answered all the purposes of money at Venice, a specie currency was wanted by persons going abroad or having payments to make in distant places. Ency. Am., tit. Bank.

The most ancient bank was that of Venice. The state being involved in debt, through a long and severe war, the public creditors were formed into a corporation, with peculiar privileges, and the debts were allowed to be transferred from one name to another, much in the same way as our public funds or the stock of our public banks. It was made a particular regulation that all payments of wholesale merchandise and bills of exchange should be in bank money; and that all debtors and creditors should be obliged, the one to carry their money to the bank, the other to receive their payments in *banco*, so that payments were made by a simple transfer of stock from one account to another. This bank may be considered the wonder of the twelfth century, but requiring much alteration to adapt it to the modes and manners of the nineteenth. Anderson's Hist. of Com., vol. 1, p. 156. See, also, Montefiore's Commercial Dict., art. Bank, where it is stated, that the banks of Venice did not become a bank in the modern sense of the word, until 1587; at which period, the extensive foreign trade with the city brought thither coins of all countries, and in every state of wear. To remedy the loss and inconvenience thus caused, the merchants were ordered to bring their coins to the bank, where they were weighed, the merchants receiving notes promising to pay the bearer on demand bullion of the proper or standard fineness, equal to the value of the coins paid in. The bank was solely one of deposit; exchanging notes for bullion and bullion for notes.

other countries of Europe;[1] among which was the famous Bank of Genoa, created in 1407. This bank was also originally instituted in the interests of the state, to facilitate loans from the citizens; and they were secured by an assignment of certain branches of public revenues. The public loan was afterward consolidated with the capital stock, and the bank was known as "The Chamber of St. George."

SEC. 7. The Bank of Amsterdam was established by the magistrates of that city in 1609, after the models furnished by the banks of Venice and Genoa; and the bank of Hamburgh in 1619, which afterward became famous; but was plundered by the French in 1813, the depositors afterward receiving a partial indemnity from the French government.[2]

In 1693, a charter was granted by William and Mary, to incorporate the Bank of England. This bank, it is claimed, was modeled after the bank of the Chamber of St. George in Genoa.[3] Previous to this time, however, various royal charters of incorporation had been granted in England to companies of tradesmen or guilds. In 1327, a charter was given to "The Goldsmiths;" in 1393, to "The Mercers;" in 1407, to "The Haberdashers;" in 1433, to "The Fishmongers;" in 1437, to "The Vinters;" and in 1466, to "The Merchant Tailors."[4] These companies, or at

[1] Banking was carried on by the drapers of Barcelona as early as 1349. But they were required to give security for the faithful discharge of their obligations. And afterward, about the year 1401, a bank was established by the magistrates of the city; the city revenues were made security for money placed therein. And they exchanged money, received deposits and discounted bills of exchange. Macph. Hist. of Com., vol. 1, pp. 540, 612.

[2] Ency. Am., tit. Bank.

[3] 3 Edinb. Ency. 219. See, also, Bank of England v. Anderson, 3 Bing. N. R. 589, for a history of the bank.

[4] And. Hist. Com., v. 2, pp. 192, 250, 324; Humes' Hist. Eng. (King John); Maitland's Hist. Lond. 826. The Bank of England is one of deposit, discount and circulation, and was instituted to assist the government in the way of loans to carry on the war against France and other nations of continental Europe. The charter was originally granted for only eleven years, and the company advanced the government £1,200,000 at an interest of eight per cent. It was originally an engine of the government, like the banks of Venice and Genoa.

The Bank of France was established in 1803; by a union of the private banking institutions of Paris, with a capital of 45,000,000 francs. In 1808 it was invested with the right to establish provincial branches, some of which were established in the commercial towns of the kingdom. Like the Bank of England, it was a bank of deposit, discount and circulation, and it made advances upon the public taxes, and like the Bank of Stockholm, it made advances upon pawns. The old Bank of the United States was incorporated by act of congress in 1791,

least some of them, possessed banking powers; but various others were incorporated for various commercial enterprises, other than banking. A charter which had been secured to a company of Burgundians in 1248, was afterward confirmed, and, in the reign of Henry VI, received the name of the "Merchant Adventurers." The "Eastland Company," was incorporated by Queen Elizabeth in 1566; the "Turkey and Levant Company," in 1581; the celebrated "East India Company," in 1600; the "Hudson's Bay Company," in 1670, and the "South Sea Company," in the reign of Queen Anne, in the early part of the eighteenth century.

SEC. 8. **Variety and importance of modern private corporations.** — The great variety and vast magnitute of many enterprises for the advancement of public and private interests, in which mankind has been interested since the beginning of the present century, requiring consolidated capital, associated talents, and the advantages of continuous succession and existence, afforded by corporations, have contributed to rapidly multiply corporate associations, and the amount of capital invested in them is almost beyond the powers of calculation or comprehension.

They embrace every object, which a religious zeal may inspire, or benevolence suggest; as well as every personal and selfish enterprise which tempts the cupidity of man. [1]

The importance of corporations, as well as the growth and changes of the law relating to them, are well set forth by Mr.

and was, by the terms of its charter, to expire in 1811. This was also a bank of deposit, discount and circulation, with a capital of $10,000,000. Ency. Am., vol. 1, tit. Bank.

[1] On this subject Mr. Walker, in his valuable Treatise on American Law, observes: "Under a republican government like ours, when property is so beneficially distributed that very large fortunes are seldom accumulated, it is manifest that great enterprises, requiring large means, would seldom be undertaken by single individuals. It is only by the creation of corporations, enabling many to unite their means, and act as one, that such enterprises are now achieved. It may be safely affirmed, that comparatively few of the wonderful improvements and developments in our country would have been made, if our legislatures had been divested of the power to create corporations, which they have so freely exercised. In this view, therefore, corporations should be favorites of republicanism; since they enable its friends to meet the only plausible argument that can be urged to sustain that unequal distribution of property, which prevails in aristocratic governments. No doubt the power to create corporations may be abused. But when exercised judiciously, it certainly produces most salutary effects." Walker's Am. L. 225.

Justice MILLER, in his usual terse and vigorous style, as follows: "The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated. They have entered so extensively into the business of the country, the most important part of which has been carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the capital and energy required to conduct these large operations, is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized and enlarged, as to constitute a branch of jurisprudence, with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time."[1]

SEC. 9. To corporations we are mostly indebted for the greatest physical achievements of our age; and through them, for a rapid, social, moral and intellectual advancement of the people. By means of the associated capital and co-operating mental abilities and talents which they have secured, continents have been spanned by railroads and covered with a net-work of telegraph wires; thus facilitating transportation, and promoting intercommunication between the people; and cables of iron have also

[1] Liverpool Insurance Co. v. The Commonwealth of Massachusetts, 10 Wall. 566. See, also, Oliver v. The Liverpool and London Life Insurance Company, 100 Mass. 531.

Let us examine the statistics in reference to an important class of corporations in this country.

The first railroad constructed in the United States was the Baltimore and Ohio, of which twenty-three miles were opened for use in 1830; but it was for two years thereafter only operative by horse power.

To show the rapid increase of railroads and of railroad interests in the United States, from 1851 to 1871, it is sufficient to state that the number of miles in operation in 1851 was 8,876; the total earnings of which were $30,466,000; whereas, in 1871, there was in operation about 50,000 miles of railroad, the total earnings of which were about $450,000,000. The increase of the gross earnings being about $400,000,000, in twenty years, or $20,000,000 annually. See Poor's Manual of Railroads (1872), pp. 24, 28.

connected countries, widely separated by oceans, thereby bringing them into nearer and more friendly relations, and enabling the citizens of each to converse with the other, like members of one common family.

CHAPTER II.

HOW CORPORATIONS ARE CREATED.

SEC. 11. **Creation an act of sovereignty.**—The power to confer corporate franchises and privileges has always been considered as vested in the sovereign authority of the state. It is an act of sovereignty. Hence, by the civil law, franchises could only be conferred by a decree of the senate, or the imperial constitutions;[1] notwithstanding the observation of Blackstone, that under the civil law, they "seem to have been created by the mere act and voluntary association of their members."[2] "But," he observes, "with us, in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given."[3]

[1] 1 Brown's Civ. L. 143; Dig., vol. 47, tit. 22; Wood's C. L. 134; Ayliffe, 196; Domat's C. L., Prel. B, tit. 11, § 2, 15.

[2] 1 Bl. Com. 472. "It does not appear that the prince's consent was necessary to be actually given to the foundation of them, but merely that the original founders of these friendly societies, for they were little more than such, should not establish any meetings in opposition to the laws of the state." Id.

[3] Id.

SEC. 12. **Creation by royal charter.** — According to the ancient common law of England, the king, by virtue of his prerogative, was the only creator of corporations; and this right was said to be "the flower of the prerogative."[1] But more recently it was held that the king's charter could, under the English constitution, confer only ordinary corporate powers, and that extraordinary authority could only be granted by the transcendent power of parliament.[2] And if the king grants charters and attempts to confer powers therein, which infringe upon constitutional rights, they are void.[3]

SEC. 13. **Creation by act of parliament.** — Notwithstanding the claims made, that the granting of charters to corporate bodies belongs to the king's prerogatives, it seems that parliament, as the representative also of sovereignty, may, by act, create corporations, to which the royal assent is, however, presumed to be given.[4] But acts of parliament, relating to corporate franchises, were formerly confined to confirmation of those charters previously granted by the king, or they conferred on the king power to create them *in futuro*. In the latter case, "however, the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative."[5]

[1] 1 Bl. Com. 472; 4 Co. 107 b.; 10 Co. 33 b.; 2 Bac. Abr. (Am. ed.) 438, tit. Corp.; 2 Kyd on Corp. 42; Miller's Eng. Gov. 149; Ang. & Am. on Corp., § 67; 1 Wilc. on Corp. 25; 1 Dill. on Corp. 53.

[2] 1 Bl. Com. 474; 1 Dill. on Corp., § 15.

[3] Id.

[4] 1 Bl. Com. 473; 10 Co. Rep. 29; 1 Roll. Abr. 512.

[5] 1 Bl. Com. 473. See, also, respecting the authority of the crown to grant charters to incorporate towns, General Municipal Corp. Act of England, 1835; also, Rutter v. Chapman, 8 M. & W. 1; Reg. v. Boucher, 3 Q. B. 654; Dill. on Corp., § 16.

General statutes have been enacted in England, under which most of the corporations are now instituted, among which are the following:

The Companies Act, 1862, 25 and 26 Vict., c. 89; and The Companies Act, 1867, 30 and 31 Vict., c. 131, which relate to and regulate all joint-stock companies not created by special acts, or charters; The Industrial and Provident Societies Act, 1862, 25 and 26 Vict., c. 87, which was amended by 30 and 31 Vict., c. 117, and 34 and 35 Vict., c. 80, which relate to friendly societies, and other similar associations; The Life Assurance Societies Act, 1870, 33 and 34 Vict., c. 61, as amended by 34 and 35 Vict., c. 58, and 35 and 36 Vict., c. 41; The Companies Clauses Consolidation Act, 8 and 9 Vict., c. 16; and The Railways Clauses Consolidation Act, 8 and 9 Vict., c. 20.

"The above statutes and especially the first two, The Companies Acts of 1862 and 1867," observes Mr. Brice, "enable persons by a very simple and speedy process to unite themselves into, and thereby create a corporation for almost any and every purpose of life, commercial or otherwise. The constitution of such corporation, its objects and purposes, its rights and powers, and those of its various members, will be determined

SEC. 14. **Corporations at common law and by prescription.** — In England corporations exist, also by what is termed common law, and by prescription. But in such cases a grant by charter of the king or act of parliament must be presumed. Those recognized at common law are such as have continued from time immemorial to exercise corporate privileges, but whose grant or charter cannot be found. And the same may be said in reference to corporations by prescription.

Each rests upon a supposed grant, and it is difficult to draw any distinction in this respect between them, though they have been frequently thus designated and distinguished.[1]

In this country, also, presumptions are sometimes made in favor of the incorporation of associations, without actual proof of the same. And proof of the existence of a corporation by reputation has been allowed from user, where it had continued to act as such for several years, but the original act of incorporation could not be found.[2] And it has been held in this country, that the exercise of corporate powers for a long time (twenty years) without objection, and with the knowledge and assent of the legislature of the State, furnished conclusive evidence of a charter, or

by the instruments drawn up — the memorandum and articles of association — at the time of registration. The acts themselves contain but little upon these heads. The chief specific provisions found in them relate to the formalities and other circumstances connected with the foundation and the dissolution, voluntary or forced, of the corporation, and with the assembling periodically of the members. The enactments that concern the working and control of the corporation, and the rights and liabilities of the shareholders and other matters belonging to the internal management of the association, are but mere *generalia*, it being left to the individuals from time to time composing the association, to fix and prescribe these in a more particular manner, and in accordance with the exigencies and requirements of the undertaking in which they propose to engage. These statutes give to the bodies coming within their purview no arbitrary or compulsory power of dealing with the rights, pecuniary or proprietary, of others than their own members." Green's Brice's Ultra Vires, 24. See, also, Buckley, pp. 15, 345.

[1] 1 Bl. Com. 473; Dill. on Corp., § 15; 1 Kyd on Corp. 41, 42; Ang. & Am. on Corp., § 69; 2 Kent's Com. 277; Town of Pawlet v. Clark, 9 Cranch, 292; 2 Inst. 330; Bract. 1, ch. 24, f. 55; 10 Co. R. 33; Ayliffe, 210.

[2] Dillingham v. Snow, 5 Mass. 547. See, also, Bassett v. Porter, 4 Cush. 487; Barnes v. Barnes, 6 Vt. 388; Londonderry v. Andover, 28 id. 416; Sherwin v. Bugbee, 16 id. 439; Ryder v. Railroad Co., 13 Ill. 523; Highland Turnpike Co. v. McKean, 10 Johns. 154; Owings v. Speed, 5 Wheat. 420; New Boston v. Dumbarton, 15 N. H. 201.

constituted a corporation by prescription, which supposes an original grant.[1]

SEC. 15. **How created in this country.**—In this country corporate rights can only be conferred by legislative acts.[2] According to the theory of our government the sovereign or supreme authority is vested in congress and the legislatures of the various states, each having its proper and limited sphere of action. Hence corporate franchises, which can only be conferred by the sovereign authority, must be secured by either an act of congress or of the legislature of the state where the corporation is to be created.[3] So, a legislature may provide for the creation of an indefinite number of corporations in one act, as well as a definite number.[4] And there is no legal difficulty in the way of the creation of a single corporation by the concurrent action of the legislatures of two or more states, nor of the creation of a corporation, where one of the constituents is a foreign corporation.[5]

SEC. 16. **Power of congress to create.**—The congress of the United States is sovereign in respect to those powers conferred upon it by the constitution of the general government, and the legislatures of the several states are sovereign in respect to those powers unless prohibited by the constitutions of the respective states or in conflict with the federal constitution. On general principles it is evident that each state has the power to create corporations or make general laws whereby they may be created, (unless expressly prohibited from so doing by constitutional provisions,) as incidental to their sovereign power and authority, and although not particularly enumerated among its constitutional powers. This doctrine was settled, after much discussion and consideration, by our courts at an early period in the history of our government;

[1] Bow v. Allenstown, 34 N.H. 351. See, also, Jameson v. People, 16 Ill. 257; People v. Maynard, 15 Mich. 463; Railroad Company v. Chenoa, 43 Ill. 209; Virginia City v. Mining Company, 2 Nev. 86; Railroad Co. v. Plumas Co., 37 Cal. 354.

[2] 1 Dill. on Corp., § 17; 2 Kent's Com. 277; United States Trust Co. v. Brady, 20 Barb. 119; Pennsylvania, etc., R. Co. v. Canal Com., 21 Penn. St. 9.

[3] Franklin Bridge Co. v. Wood, 14 Ga. 80.

[4] Falconer v. Campbell, 2 McLean, 195.

[5] Bishop v. Brainerd, 28 Conn. 289. The life of a private corporation dates from the time it commences to do business. Hanna v. International Petroleum Co., 23 Ohio St. 622.

and those early decisions have been followed, not only by the federal, but by the various state courts. In an early case in the supreme court of the United States, in reference to the incidental and implied powers of congress to create corporations, the court said: "If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or the uses to which they have been applied, we find no reason to suppose that a constitution omitting, and wisely omitting to enumerate all means for carrying into execution the great powers vested in government, ought to have specified this."[1]

Although no express power is found in the federal constitution for the creation of corporations, the right is now universally recognized by the courts, and has frequently been exercised by congress, not only by special and general statutes for the creation of national banks within the states, but also for the creation of corporations, both public and private, in the several territories of the Union.[2]

SEC. 17. **Sovereign authority of state legislatures.**—The power of legislatures are limited only by state constitutions. The legislatures of the several states have, by their respective constitutions, the power to make laws, and legislate upon all subjects pertaining to the public benefit, and this, in the absence of express provisions on the subject, carries with it, by implication, the right to use all the means requisite to the accomplishment of the objects of legislation, consistent with the purposes for which the government is instituted, and with the state and national constitutions. The public benefit to be derived is the consideration on the part of the state for the creation of private corporations. The motive of the sovereign creating it is supposed to be some good that the public will derive from it.[3] This advantage has been considered

[1] McCulloch v Bank of Maryland, 4 Wheat. 421. See, also, 1 Ham. Works, 111.

[2] See ante, § 15; Dill. on Corp., § 18; McCulloch v. Bank of Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 id. 738; Thomson v. Pacific R. Co., 9 Wall. 579; Pacific R. Co. v. Lincoln Co., 1 Dill. (C. C.) 314. See, also, as to National Banks, U. S. Rev. Stat. (1874) p. 998.

[3] Domat's Civ. L. 452; 1 Bl. Com. 467; Dartmouth College v. Woodward, 4 Wheat. 637; Ang. & Am. on Corp., ch. 1; Currie's Adm. v. Mut. Ins. Co., 4 H. & M. (Va.) 347.

sufficient to bring their creation, by the legislatures, within the scope of their general powers to legislate for the public benefit, and it seems now to be universally recognized.[1]

SEC. 18. **General statutes for incorporation.**—It is undoubtedly the true public policy, to provide for the incorporation of corporations, either public or private, by general statutes enacted for that purpose. Mr. Dillon alludes to this policy in reference to municipal corporations; and the advantages of general statutory enactments in relation to incorporations for municipal purposes, would be equally applicable to private ones. He says: "1. It tends to prevent favoritism and abuse in procuring extraordinary grants of special powers. 2. It secures uniformity of rule and construction. 3. All being created and endowed alike, real wants are sooner felt and provided for, and real grievances sooner redressed."[2]

Governed by this evident public policy, the legislatures of most of the states have passed general statutes for the incorporation of private associations for all the various objects and private purposes to which the talents and capital of the citizen may be profitably directed. In fact, the constitutions of many states particularly prohibit special acts of incorporation, or only permit incorporations under general laws.[3] General statutes on the subject of incorporations generally prescribe the manner in which private corporations may be organized; the business to be conducted by them; the limit of the liability of members; and, in general, the powers, privileges and immunities intended to be conferred, and the liabilities imposed, among which are usually the following: 1. To have perpetual succession; 2. To sue and be sued by the corporate name; 3. To have a common seal which

[1] United States Trust Co. v. Brady, 20 Barb. 119; 1 Dill. on Corp., § 17; Ang. & Am. on Corp., § 71; Black River, etc., R. Co. v. Barnard, 31 Barb. 258.

An English joint-stock company, having powers incident to a corporation, has been treated as a corporation in this country, although an act of parliament declared that such company should not be treated as a corporation. Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566.

[2] 1 Dill. on Mun. Corp., § 20.

[3] Const. Ia., art. 8 (Leg. Def.). § 30; Const. Cal., art. 4, § 31; Const. N. Y., 1846, art. 3, § 17. If the constitution prohibits the creation except under general laws, it is restrictive in the strict sense of the term; and no powers can be granted by a special act. City of San Francisco v. Spring Valley Water Works, 48 Cal. 493.

they may alter at pleasure; 4. To render the interests of the stockholders transferable; 5. To exempt the private property of members from liability for corporate debts; 6. To make contracts, acquire and transfer property, possessing the same powers and rights, and subject to the same liabilities in those respects as private individuals; 7. To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs in accordance with law.

These powers and franchises it will be noticed are among the common-law incidents of corporations. But the power of the legislature is supreme in this respect, and there can be no doubt of its right to extend or limit the common-law rights of corporations, or prohibit them altogether. The mode of organizing private corporations for pecuniary gain under these general statutory provisions is, as we have observed, provided for, and directed by them. Parties desiring to become incorporated are usually required, preliminary thereto, to subscribe certain articles of association, containing generally the following items, or some of them, to wit: —

The name of the corporation, and the principal place of transacting business; the general nature of the business to be transacted; the amount of the capital stock authorized and the times and conditions of payment; the time of the commencement and termination of the corporation; by what officers or persons its affairs are to be conducted, and the times at which they will be elected; and the highest amount of indebtedness to which it is at any time to subject itself. Other things may be required, but these items will perhaps cover the general requirements of such articles by the statutes. These articles are also usually required to be recorded in some public office, and some notice of the same, in some manner, publicly given. And they not only frequently provide for the punishment of the corporators guilty of fraud in the organization and management of the same, but subject them to personal liability therefor.[1]

[1] Code Iowa, tit. Corp., 183; Mass. St. 1870, ch. 324; statute 1873, 173; 1874; ch. 29, 165, 349. On the subject of the personal liability of members or stockholders of corporations in the various States, see *post*, § 76, note 8.

SEC. 19. **The national banking law.**—The act of congress, providing for the association and incorporation of persons for the carrying on of the business of banking, provides that they shall consist of not less than five persons, who are required, as a preliminary step to incorporation, to sign articles of association, which must specify in general terms the object for which the association is formed, and may contain any other provisions not inconsistent with law, which the association may think fit to adopt for the regulation of its business, and the management of its affairs; and they are required to be signed by the persons uniting to form the association, and a copy of them is required to be filed in the office of the comptroller of the currency.[1]

[1] Act June 3, 1864, ch. 106, § 5, v. 13, Par. 100; Rev. Stat. (1874) p. 998, tit. 62, § 5133. This act further provides:

Sec. 5134. The persons uniting to form such an association shall under their hands make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the comptroller of the currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, and city, town or village.

Third. The amount of capital stock and number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title.

Sec. 5135. The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the comptroller of the currency, who shall record and carefully preserve the same in his office.

Sec. 5136. Upon duly making and filing articles of association and an organization certificate the association shall become as from the date of the execution of its organization certificate a body corporate, and as such and in the name designated in the organization certificate it shall have power:

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchises become forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws, not inconsistent with law, regulating the manner in which its stock shall be transferred, its general business conducted, and the privileges granted to it by law exercised and enjoined.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of

SEC. 20. **Of the power to delegate authority to create a corporation.**— Although it was formerly held in England that the act of incorporation must be the immediate act of the sovereign authority, yet the law seems now well settled there, that the king may give a general authority to some other person to create them, on the principle that, *qui facit per alium facit per se.*[1] For instance, it has been held that the chancellor of the university of Oxford is authorized to grant corporate privileges by virtue of the royal authority conferred upon him, and that by virtue of such authority he may create incorporated companies of tradesmen; but this is upon the theory, after all, that the king creates.[2]

SEC. 21. **Of the power of territorial legislatures to create.** — It is evident that the various legislatures of our territories, under the general legislative authority conferred by congress, may create corporations as incident to the authority possessed by them, subject, however, to the provisions of the acts of congress conferring this authority. In such cases the sovereign authority of the United States, or of congress as the representative of it, is conferred upon the legislature of the territory, and the territorial authority in this respect is supreme.

It is now, however, expressly provided by an act of congress, that "the legislative assemblies of the several territories shall

exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title. But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking.

Sec. 5137. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales, under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due it. But no such association shall hold such real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.

[1] 1 Kyd on Corp. 50; 1 Bl. Com. 473.

[2] 1 Bl. Com. 473. See, also, 3 Wills., § 409; St. Mary's Church, 7 S. & R. 517; State v. Armstrong, 3 Sneed, 634; Riddick v. Amelin, 1 Mo. 5; Mayor, etc., v. Shelton, etc., Bank; 1 Head, 80; Vance v. Farmers', etc., 1 Blackf. 24.

not grant private charters or special privileges, but may, by general incorporation acts, permit persons to associate themselves together as bodies corporate, for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, churches, libraries, or any benevolent, charitable or scientific association."[1]

If, by virtue of any special or general act of such territorial legislature, a corporation is created or organized, it could not be affected in respect to its corporate rights by the subsequent adoption of a State constitution, or by any change made by subsequent acts of the legislature thereunder in relation to incorporations.[2]

SEC. 22. **Corporations by prescription in this country.** — We have already referred to the existence of corporations by prescription in England, and shown that even in this country the same doctrine has been recognized in reference to corporate existence.[3] The English doctrine has been recognized in relation to a class of corporations now very limited in this country, where the corporate rights were conferred previous to our independence. The common law of England at that time became a part of our inheritance, and corporations then existing here, with all their common-law incidents, continued to exist, and were not affected by the new organization and establishment of our government. At that time the English church establishment existed in this country, carrying with it those corporate rights of the parsons thereof to take in succession, and securing to him and other officers of the church all the common-law corporate rights pertaining to them. If before the Revolution an Episcopal church was duly established, the parson was by the common law entitled to the glebe, *jure ecclesiæ*, and was capable of transmitting the inheritance; and such corporations have been recognized by our courts since the establishment of our government.[4] Where a parish had acted as a corporation for more than forty years it was held proper to

[1] Rev. Stat. U. S. (1874) tit. 23, ch. 1; tit. Territories, p. 333, § 1889.

[2] Vincennes University *v.* Indiana, 14 How. 268; Myers *v.* Bank, 20 Ohio, 283.

[3] *Ante*, § 13; 2 Kent's Com. 277.

[4] Town of Pawlet *v.* Clark, 9 Cranch, 294; Terrett *v.* Taylor, id. 43.

show its corporate existence by reputation.[1] And where for thirty years a town had exercised corporate privileges, it was permitted to show this by parol as tending to prove that it had been duly incorporated with the ordinary powers of incorporated towns.[2]

On the subject of the continuance of corporate rights existing in this country at the time of the establishment of our independence, Mr. Kent observes: "There are, however, several of the corporations now existing in this country, civil, religious and eleemosynary, which owed their origin to the crown and under the colonial administration. Those charters granted prior to the Revolution were upheld either by express provision in the constitutions of the states, or by general principles of public and common law, of universal reception; and they were preserved from forfeiture by reason of any nonuser or misuser of their powers during the disorders which necessarily attended the Revolution."[3]

The recognition of corporations by prescription is from the reasonable presumption, that as they have been recognized and suffered to exist for a long time they were originally lawfully created. In England the doctrine is more important than in this country, where our existence as a nation is comparatively short, where corporations are all created by legislative acts, and there are few occasions for the application of it to corporate claims.

SEC. 23. **Foreign joint-stock companies may be corporations.** — In a recent case in this country, an English joint-stock company, having the incidents and powers of a corporation at common law, was held to be a corporation, although acts of parliament, in accordance with a local policy, declared that it should not be so held. The company was organized under the laws of Great Britain, for the purpose of conducting the business of insurance under a certain deed of settlement, legalized and enlarged by acts of parliament, and by virtue of such deed and such acts possessing the following characteristics and powers: 1. A distinctive and artificial name, by which it could make contracts; 2. A statutory

[1] Dellingham v. Snow, 7 Mass. 547.

[2] Hagerstown Turn. Co. v. Creeger, 5 H. & J. (Ind.) 122; Shrewsbury v. Hart, 1 C. & P. 113. See, also, 1 Dill. on Corp., § 17; *ante*, § 14.

[3] 2 Kent's Com. 276.

authority to sue and be sued in the name of its officers as the representatives of the whole body; 3. Perpetual succession by the transfer and transmission of the shares of its capital stock, when new members were introduced in the place of those who died or sold out; 4. An existence as an entity apart from the shareholders, which enabling it to sue its stockholders and be sued by them. A statute of Massachusetts, where the company was transacting business, imposes upon "each fire, marine, and each fire and marine insurance company, incorporated or associated under the laws of any government or state, other than one of the United States, a tax of four per cent upon all premiums charged or received on contracts made in this commonwealth for insurance of property." The same statute imposes a tax of but two per cent upon such premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; and upon such companies incorporated by itself in Massachusetts only one per cent, while no tax is imposed by the laws of the State upon the business of insurances transacted by any natural persons, citizens of the same. The company failed to pay the tax prescribed by the statute, and the State filed a bill in the proper court to enforce the payment of the same or the suspension of the business of the company. In defense the company claimed that it was not incorporated at all, but was merely an association under the laws of Great Britain, having the legal character of a partnership; and that it could not be taxed as a "company incorporated under the laws of any government or state other than one of the United States;" that the character of the association must be determined by the laws of Great Britain; that under those laws the association was a mere partnership of a large number of persons, having certain privileges granted by statute; that these privileges cannot be enjoyed in this country; that they relate to remedies; that the acts of parliament are inoperative beyond the limits of the jurisdiction of the courts of Great Britain; that the right to be sued in the names of its officers is of no avail in this country; and that the English authorities show that the association is not a corporation.[1] On the

[1] Harrison v. Simmons, 4 M. & W. 704; Van Sandau v. Moore, 1 Russ. 510; Bartlett v. Pentland, 1 B. & Ad. 441; Cape's Ex'rs, 2 De Gex, Macn. &

other side it was claimed that this association was, by acts of parliament, clothed with all the characteristics of a corporation; and that its legal character could not be changed by calling it something else.

On the final hearing of this case the company was enjoined from the further prosecution of its business until the taxes found due should be paid. And the supreme court of the United States, to which the case was taken, affirmed this judgment. Justice Miller, in delivering the opinion of the court, remarks: "The banking business of the states of the Union is now conducted chiefly by corporations organized under a general law of congress, and it is believed, that in all the states, the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the acts of parliament we have mentioned. To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But, however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large portion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain. So, also, it is said that the fact that there is no provision, either in the deed of settlement or the act of parliament, for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction, in this respect, between the act of parliament, which authorizes suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer, even if the suit were in such artificial name. It is also urged that the several acts of parliament we have mentioned expressly declare that they shall not be held to constitute the

G. 562; Mayhew's case, 5 id. 562; Blakeley's Ex'rs, 13 Beav. 133; Burnes v. Pennell, 2 H. of L. C. 497.

corporate body a corporation. But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become, technically, corporations. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body. The question before us is, whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals. We have no hesitation in holding that, as the law of corporations is understood in this country, this association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that state, on the condition of a payment of a specific tax, is no violation of the federal constitution, or of any treaty protected by said constitution."[1]

SEC. 24. **The corporate name.** — In whatever manner a corporation is created, it is necessary that it be designated by a particular name. If it is created by charter or special legislative act, the name is necessarily given, "for the name is as it were the very being of the constitution, without which they could not perform their corporate acts, for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name."[2] The name of a corporation is the name of its baptism. Blackstone observes: "Where a corporation is erected a name must be given to it, and by that name it must sue and be sued, and do all legal acts, though a minute variation therein is not material. Such name is the very being of its constitution, and through it the will of the king that erects the corporation is expressed, and the name is the

[1] Liverpool Insurance Company v. The Commonwealth of Mass., 10 Wall. 566. See, also, Paul v. Virginia, 8 id. 168

[2] Bac. Abr., tit. Corp. C.

knot of its combination, without which it could not perform its corporate functions."[1] It is not only essential that it should have a particular name to distinguish it from other corporations, but also by which it may contract, and grant and receive property, and sue and be sued.[2]

If a corporation is organized under general statutory provisions, it is usually provided that it shall have some name, as well as a location, and by such name only can it exercise the corporate functions; and the name given by the charter or special act, or assumed under general laws, cannot be changed by corporate action.[3] But where the constitution prohibits the creation of corporations by special enactments, this does not prohibit the changing of the name of a corporation by such legislation. In a recent case in California involving this question it was held, that the mere changing of the name of a corporation was not the creation of a corporation in the sense of the constitution; that it was no more the creation of a corporation than the changing of the name of a natural person is the begetting of a natural person, and that a change of name is not a change of being.[4]

[1] Per Sir Ed. Cooke, 10 Rep. 28; 1 Bl. Com. 474. "Every corporation should have a name by which it should be known as grantor and grantee, and to sue and be sued, and do all legal acts. Such name is the very being of its constitution, the 'knot of its combination,' without which it could not perform its corporate functions." Ang. & Am. on Corp., § 99; Smith's Mer. Law, 133.

[2] 1 Dill. on Corp., § 117; Walker on Am. Law, 224.

[3] 1 Dill. on Corp., §§ 119, 120; Ang. & Am. on Corp., § 102. "Partnerships and simply joint-stock trading companies may be at liberty to change their name or style, yet after a company has been incorporated by a name set forth in the act of incorporation, such incorporated company has not the right nor the power to change its name." Id.; Regina v. Registrar, etc., 10 Ad. & El. (N. S.) 839.

[4] Pacific Bank v. De Roe, 37 Cal. 538; Wilc. on Corp. 34; Episcopal Society v. Episcopal Church, 1 Pick. 372. A change of name does not necessarily involve a change of the identity of the corporation. Girard v. Philadelphia, 7 Wall. 1. In a recent case in Tennessee it was held that a court of equity may, upon objection being made to the organization of a corporation by a specific name, on the ground that another corporation has already adopted the proposed name, or one so near like it as to lead to confusion, requires a sufficient modification of it as to obviate the objection. *Ex parte* Walker, 1 Tenn. Ch. 97. See, also, Newby v. Oregon, etc., R. Co., Deady, 609; Holmes v. Holmes Man. Co., 37 Conn. 278; Ang. & Am. on Corp., §§ 117 to 123. As to the sufficiency of a name under the Indiana statute of May 12, 1852, see Piper v. Rhodes, 32 Ind. 69. A corporation may acquire a name by usage. Smith v. Plank Road Co., 30 Ala. 650. A mere change of name by the legislature does not affect the rights of third persons. Rosenthal v. Madison, etc., R. Co., 10 Ind. 359. A corporation may be known by one name by prescription and one by grant; but where there is more than one grant the last grant will take the place of the others. 1 Dill. on Corp. 117; Knight v. Wells, I Ld. Raym. 80; Physicians v. Salmon, 3 Salk. 102;

collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property; though powers are, in general, expressly given."[1] And if the name should be omitted in the charter, still, if from its language, or the nature of the thing granted, this could be ascertained, it would be sufficient to constitute a corporation, by the name thus indicated.[2] And where an act of the legislature of Arkansas merely provided that a bank should be established, without other incorporating words, but it also provided for a certain number of directors, and the usual banking powers were conferred upon them, it was held that the directory was incorporated by implication, and that they possessed the ordinary powers of a corporate body.[3] It may be affirmed as a general principle that where rights, franchises and powers are granted by a competent authority to a body or association of persons, and the exercise of these cannot be enjoyed, unless they are considered as a corporate body, they will be considered as such by implication, although no corporate powers are expressly granted.[4]

SEC. 27. **Common-law incidents of a corporation.** — The common-law incidents of a corporation are perpetual succession; and the right to sue and be sued in the corporate name; to plead and be impleaded; to grant and receive property; to purchase lands and hold them for the benefit of themselves and their successors; to

[1] 1 Kyd on Corp. 63. See, also, Case of the Borough of Yarmouth, 2 B. & G. 292; Poor, etc., *v.* Sears, 22 Pick. 122; 1 Dill. on Corp., § 21.

[2] Trustees, etc., *v.* Parks, 10 Me. 441; School Com'rs *v.* Dean, 2 Stew. & Port. (Ala.) 190.

[3] Mahony *v.* Bank of Arkansas, 4 Ark. 620; Murphy *v.* Bank of Arkansas, 2 Engl. (Ark.) 57; Woodruff *v.* Attorney-General, 3 id. 236; 1 Kyd on Corp. 63; Falconer *v.* Campbell, 2 McLean (C. C.), 195.

[4] Stebbins *v.* Jennings, 18 Pick. 187; Commonwealth *v.* Westchester R. R. Co., 3 Grant's (Penn.) Cas. 200; New Boston *v.* Dunbarton, 15 N. H. 201. But a corporation created by statute can exercise no powers except those expressly given or necessarily implied. Perrine *v.* Chesapeake, etc., Canal Co., 9 How. 182. The construction of the charter must be such as would best carry into effect the will of the legislature. Chesapeake, etc., Canal Co. *v.* Key, 3 Cranch (C. C.), 599. The contract between the government and a corporation created by its charter, is to be construed upon the same principles which apply to contracts between individuals. State *v.* Noyes, 47 Me. 189. But where the rights of individuals, in the lawful enjoyment of their property, is involved, in the determination of corporate claims, the rights of corporations under their charters are not to be extended by implication. Auburn, etc., R. R. Co. *v.* Douglass, 9 N. Y. 444. See, also, Bank of Pennsylvania *v.* Commonwealth, 19 Penn. St. 144.

have a common seal; and to make by-laws for the regulation and government of the affairs of the corporation.[1]

Sec. 28. **Acceptance of the grant.** — The acceptance of the charter or act, or the provisions of the general statutes providing for incorporation, is necessary in order to create a private corporation. In this respect a private corporation differs from a public one, as we shall hereafter more particularly notice.[2] A charter or legislative act of incorporation is usually a mere offer or tender of the corporate privileges contained in it, or if no privileges are specified, then of the common-law powers and immunities, and the common-law incidents of corporations. The sovereign authority cannot compel persons to become a private corporation. They can only become such by their voluntary consent. But this consent, as we shall have occasion hereafter to consider, may be inferred from their acts.[3] A charter or act of incorporation, for private purposes and personal objects, if accepted, becomes a contract between the parties accepting and the state, and an offer of corporate privileges, on the one side, must be accepted on the other, in order to give the contract full force and virtue.

This doctrine is established by the uniform current of decisions of courts of highest authority, not only in this country but in England.

In the famous Dartmouth college case, the court say: "Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their benevolent institution. It was granted. An artificial

[1] 1 Bl. Com. 475; 2 Kent's Com. 277; Kyd on Corp. 13, 69, 70.

[2] See *post*, ch. 3. Mr. Dillon observes: "The king cannot incorporate a body of men without their assent. Until his charter has been accepted, it is inoperative. When once accepted, the acceptance is irrevocable. The acceptance must be by those to whom it is addressed; and it is held that a valid acceptance may be made by a majority of the grantees. The charter must be accepted *in toto*, or not at all, for there can be no partial acceptance without the consent of the crown, which must be shown by matter of record." Dill. on Corp., § 15.

[3] 2 Kent's Com. 277; Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; Bank of United States *v.* Dandridge, 12 Wheat. 70. See, also, Goddard *v.* Pratt, 16 Pick. 412; Green *v.* Seymour, 3 Sandf. Ch. 285; York & Co. *v.* Regina, 18 Eng. L. & E. 199; Ellis *v.* Marshall, 2 Mass. 269; Lincoln *v.* Richardson, 1 Gr. (Me.) 79; Fire Department, etc. *v.* Kipp, 10 Wend. 266; Falconer *v.* Campbell, 2 McLean (C. C.), 196; Dartmouth College *v.* Woodward, 4 Wheat. 518.

immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it."

SEC. 29. **Mode of acceptance.** — The charter or act may be accepted by a vote of a majority of the corporators;[1] but such direct action is not essential. If the persons or association to whom a grant of corporate privileges is tendered, proceeds to act under it, this is an acceptance, and the contract, between the state and the corporators, becomes complete. If the persons have applied for a charter, the offer of it to them is said to be *in fieri*, and they may still accept or refuse it.[2]

Although the secretary may be required to keep a record of the proceedings of meetings of the stockholders or members, and of the directors, it is not necessary that a record be made showing an acceptance of the grant, but acceptance may be inferred from the acts of its agents.[3]

If certain acts are required to be done by corporators under the provisions of either a special or general act, then, unless those acts are done, the corporation cannot be considered as in being.[4] But if such acts are done by the persons intended to be benefited or incorporated, the corporation is complete, and the duties imposed by the act will attach to the corporation.[5]

SEC. 30. If they have held meetings; adopted by-laws; elected officers; or done other corporate acts; this would be evidence of

[1] Lincoln, etc., Bank *v.* Richardson, *supra;* Commonwealth *v.* Jarrett, 7 S. & R. 461; Dartmouth College *v.* Woodward, *supra;* Ang. & Am. on Corp., § 84.

[2] Charles River Bridge *v.* Warren Riv. Bridge, 7 Pick. 344; State *v.* Dawson, 16 Ind. 40.

[3] Harr. & Gill. 324; Taylor *v.* Griswold, 2 Gran. (N. J.) 223; Fairfield Turnpike Co. *v.* Thorp, 13 Conn. 173; King *v.* Ashwell, 12 East, 122. See, also, Rex *v.* Westwood, 4 B. & C. 786.

It is not necessary that the records of a corporation should show a formal acceptance of the act. Russell *v.* McLellan, 14 Pick. 63 See, also, Sumrall *v.* Mutual Ins. Co., 40 Mo. 27; Taylor *v.* Newberne, 2 Jones' (N. C.) Eq. 141; Hudson *v.* Carman, 41 Me. 84; Mead *v.* Keeler, 24 Barb. 20; Zabriskie *v.* C., C. & C. R. Co., 23 How. 381.

[4] Fire Dept. *v.* Kipp, 10 Wend. 266; 2 Kent's Com. 293; 1 Redf. on Railw. 64; Ang. & Am. on Corp., § 95 *et seq.;* Minor *v.* The Mich. Bk., 1 Pet. 46; Burt *v.* Farrar, 24 Barb. 518.

[5] Riddle *v.* Proprietors, etc., 7 Mass. 187; Goshen Turnpike Co. *v.* Sears, 7 Conn. 86; Shortz *v.* Unangst, 3 W. & S. 45; Bank of U. S. *v.* Dandridge, 12 Wheat. 70. The mere passage of an act of incorporation does not make the contract, as it may be repealed prior to a full acceptance by the corporation. Mississippi Society *v.* Musgrove 44 Miss. 820; S. C., 7 Am. Rep. 723.

acceptance of the grant, though no formal acceptance of record could be shown And the doing of acts by persons acting in the usual way of corporate agents, and which would not be consistent except upon the theory of acceptance, would be evidence of it.[1]

SEC. 31. **Acceptance must be unconditional.** — If a charter is offered, it is only necessary, as a general rule, that it be accepted by a majority of the persons mentioned as corporators.[2] But it must, in all cases if accepted, be taken unconditionally; and by accepting the privileges conferred, the corporators will be required to perform the conditions imposed by it. Nor can the corporators claim the benefits of the charter unless they perform all the precedent conditions required by it in order to constitute the corporation. These conditions precedent are any thing which, by the express provisions of the charter or act, are required to be performed by the persons claiming the benefit of it, as a preliminary to incorporation, or the foundation for the exercise of the powers and privileges of the grant.[3]

SEC. 32. So, likewise, the exercise of a power granted by an amendment of the charter of a corporation is evidence of an acceptance of the amendment by the corporation.[4] And when a charter or amended charter is once accepted, no subsequent withdrawal of the corporators therefrom can affect the obligations imposed thereby.[5] And one who deals with a corporation acting under an amended charter, and in its amended name, cannot complain that the amendment has not been properly accepted.[6] A

[1] Crump *v.* U. S. Mining Co., 7 Gratt. 352; Commonwealth *v.* Cleghorn, 1 Harris (Penn.), 113; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124; Bac. Abr., tit. Corp. Acceptance of an act of a legislature may be inferred from the exercise of corporate powers, or other unequivocal acts on its part, but this cannot prevail against direct proof. Lyons *v.* O. A. & M. R. Co., 32 Md. 18; Narraganset Bank *v.* Atlantic Silk Co., 3 Metc. 282; Dedham Bank *v.* Chickering, 3 Pick. 335; Penobscot Broom Co. *v.* Lamson, 16 Me. 224.

[2] Rex *v.* Amery, 1 T. R. 575; Penobscot Bank *v.* Lamson, 4 Shep. (Me.) 224; Day *v.* Stetson, 8 Gr. (Me.) 365; Curry *v.* Railroad Co., Penn. St. (1868); Lyons *v.* Orange, etc., R. Co., 32 Md. 18.

[3] Lyons *v.* Orange, etc., R. Co., *supra;* The Atlantic R. Co. *v.* Dietz, 50 Ill. 210; S. C., 1 With. Corp. Cas. 439; 1 Redf. on Rail., § 18, p. 64 *et seq.*, and notes.

[4] Wetumpka, etc., R. Co. *v.* Bingham, 5 Ala. 658; Palfrey *v.* Paulding, 7 La. Ann. 363; Bangor, etc., R. Co. *v.* Smith, 47 Me. 34.

[5] Busey *v.* Hooper, 35 Md. 15. See, also, Basshor *v.* Dressel, 34 Md. 503.

[6] Eppes *v.* Mississippi, etc., R Co., 35 Ala. 33. And a majority may adopt an amendment. Sprague *v.* Illinois Riv. R. Co., 19 Ill. 174.

company, also, having accepted a charter, cannot insist that any provision therein was fraudulently obtained, but it is bound by all of its provisions.[1]

SEC. 33. **Acceptance under general laws.** — Where persons proceed to incorporate under general statutes enacted for this purpose, the signing of the preliminary articles of association, or the certificate required by the statute, and a compliance generally with the requirements of the law would undoubtedly be deemed an acceptance of the grant and the conditions of it.[2]

We shall hereafter consider the nature and character of the accepted charter or corporate contract of a corporation instituted for private purposes, and illustrate the distinctions between them and public corporations.

SEC. 34. **The term "constating instruments."** — It will be apparent from what has been said, in relation to private corporations and the modes by which they may be created, and especially of the manner in which they are usually constituted in this country, that not only statutory provisions, but various instruments in writing are required. These means and instruments for effecting incorporation may be numerous; consisting of statutes, articles of association, deeds of settlement, by-laws and notices; some of which are usually required to be recorded, and others published. The convenience of using some short term, to express all of these fundamental acts and instruments, in a work of this character, will be manifest. We will, therefore, adopt for this purpose the one frequently, and it seems to me very appropriately, used by Mr. Brice in his valuable treatise on the doctrine of Ultra Vires; namely, "constating instruments."[3]

[1] Busheck, etc., *v.* Ebbets, 3 Edw. Ch. 353.

[2] Mokelumne, etc., R. Co. *v.* Woodbury, 14 Cal. 424; Field *v.* Cooks, 16 La. Ann. 153; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Thompson *v.* Candor, 60 Ill. 244; Hunt *v.* Kansas, etc., Bridge Co., 11 Kans. 412; Ang. & Am. on Corp., § 83; Lyons *v.* Orange, etc., R. Co., *supra;* Hope Ins. Co. *v.* Beckmann, 47 Mo. 93, where it was held that the assent of the corporation to amendments might be inferred from acts or omissions inconsistent with any other hypothesis. See, also, Hope Ins. Co. *v.* Koeller, id. 129.

[3] On this subject, Mr. Brice says: "It may here be observed, that the expression, "constating instruments," will very generally be employed in this work to signify the document or collection of documents which fix the

constitution of any corporation. These documents are very various, charters, letters patent, statutes of the founder, acts of parliament, by-laws, deeds of settlement, articles of association, and not unfrequently they will be very numerous tand lengthy, the original muniments having been added to or modified by many subsequent proceedings, resolutions and the like. Therefore it will be far more convenient to have one single term always denoting the same general fact, but varying in its exact meaning with the circumstances." Green's Brice's Ultra Vires, 38.

"The term 'constitution,'" observes Mr. Redfield, "as applied to corporations, is susceptible of being used in very different senses. It may imply nothing more than the charter or formal grant of corporate organization and powers by the sovereignty, or it may be applied to certain fundamental principles, declared by the corporators themselves, as the unalterable basis of the organization of the body; or if not wholly unalterable, not to be altered, except by the adoption and concurrence of certain formalities not likely to occur, except in regard to changes of very obvious necessity; or the term may be used to signify the constituent members, or different bodies of which the corporation is composed." 1 Redf. on Rail., § 17.

CHAPTER III.

PRIVATE CORPORATIONS — NATURE AND CHARACTER OF.

SEC. 35. **Distinction between public and private corporations** — We have already referred to some of the characteristic differences between public and private corporations; but the character of this treatise demands a fuller consideration of the marked distinction between them, and of the character of the grants creating them; for important interests frequently depend upon this distinction. We have said that public corporations were those instituted for public and political purposes only, and in which the citizens of the district or territory are supposed to have a common interest. The grant of such corporate privileges is generally made, and such corporations instituted, without the consent of the corporators or members. Public corporations may be imposed upon a people, *nolens, volens*; and they do not partake of the nature of a contract between the state, and the parties becoming members of it, by the mere creation of the corporation.

They are members solely and only by virtue of their residence within the territorial limits of the locality, that is constituted the public or municipal corporation by the sovereign authority.[1]

All private corporations, however, are, in a certain sense, of public interest. In fact, the conferring of private and particular powers and franchises upon a society of persons, and giving them privileges not commonly enjoyed without such grant, and thereby surrendering to the corporate body authority which otherwise must remain in the sovereignty of the state, can only be justified on the ground of the public benefit to be derived from the grant, and that the state in this way will be fully indemnified for the surrender or transfer of its supreme rights, in respect to the authority conferred.[2]

SEC. 36. **Legislative control of public corporations.**—We have said that public corporations are such as are established for public and municipal purposes, or such as are constituted for civil and local

[1] "The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is assented to or accepted by the corporators, has no application to statutes creating municipal corporations. * * * All who live within the limits of the incorporated district are bound by them, and can only withdraw from the corporation by removal." 1 Dill. on Corp., § 23.

[2] Cooley on Const. Lim. 395; Providence Bank v. Billings, 4 Pet. 514; Charles River Bridge v. Warren Bridge, 11 id. 544; Richmond, etc., R. Co. v. Louisa, etc., R. Co., 13 How. 71; Bradley v. New York, etc., R. Co., 21 Conn. 294; Chenango Bridge Co. v. Binghamton Bridge Co., 27 N. Y. 87; State v. Krebs, 64 N. C. 604; Pennsylvania R. Co. v. Canal Com., 21 Penn. St. 22; Mills v. Williams, 11 Ired. (N. C.) 558. In this case the court, by PARSONS, J., say: "The purpose in making all corporations is the accomplishment of some public good. Hence, the division into public and private has a tendency to confuse and lead to error in investigation; for unless the public are to be benefited it is no more lawful to confer exclusive rights and privileges upon an artificial body than upon a private citizen. The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this body a portion of the power of the legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed or annulled. Other corporations are the result of contract. The legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two make a contract. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. It is a contract, and, therefore, cannot be modified, changed or annulled, without the consent of both parties. Counties are an instance of the former; railroad and turnpike companies, of the latter class of corporations." See, also, Cooley on Const. Lim. 394; Pennsylvania R. Co. v. Canal Com., 21 Penn. St. 22.

government.[1] Incorporations of this character constitute no contract between the state and the corporation. The powers and franchise thereby conferred are always subject to the right of the authority conferring them, to resume or modify and control them at pleasure.[2] The power of the legislature over such corporations is only restrained in certain cases by constitutional limitations. It may change or abolish them, as it may deem the public interest requires.[3]

And it may be affirmed as a principle, based upon the soundest public policy, that where public or municipal corporations are created, the special powers conferred upon them for local government are not vested rights as against the state, but may be changed at pleasure by the legislature. "Otherwise," in the language of Justice McKEAN, "there would be numberless petty governments existing within the state and forming part of it, but independent of the control of sovereign power."[4] And such powers may be abolished, qualified, changed or limited, either by a special act for that purpose, or by general provisions relating to all such corporations.[5] On this subject the supreme court of Louisiana say: "The government of cities and towns, like that of the police jury of parishes, forms one of the subdivisions of internal administration of the state, and is absolutely under the control of the legislature. The laws which establish and regulate municipal corporations are not contracts, but ordinary acts of legislation, and the powers they confer are nothing more than mandates of the sovereign power; and those laws may be repealed or altered at the will of the legislature, except so far as the repeal

[1] 1 Dill. on Corp., § 30.

[2] 1 Dill. on Corp., §§ 30, 31, 32; Cooley on Const. Lim. 279, 280.

[3] Allen v. McKeaen, 1 Sumner, 276, (opinion by STORY, J.); People v. Morris, 13 Wend. 32, in which NELSON, J., said: "It is an unsound and even an absurd proposition that political power conferred by the legislature can become a vested right as against the government, in any individual or body of men."

A marked distinction between public and private corporations at common law was the difference in the individual liability of the corporators. In private corporations they were not liable for corporate debts, but the property of the members of public corporations was liable to be taken to satisfy a judgment against the corporate body. Adams v. Wiscasset Bank, 1 Me. 364; Bowen v. New Gloucester, 14 Mass. 216; Marcy v. Clark, 17 id. 333; Commonwealth v. Blue Hill Turnpike Co., 5 id. 420; Atwater v. Woodbridge, 6 Conn. 223.

[4] State Bank v. Knoop, 16 How. (U. S.) 369.

[5] Id. See, also, Sloan v. State, 8 Blackf. (Ind.) 361.

or change may affect the rights of third persons acquired under them."[1]

As public corporations are not strictly embraced within the scope of this treatise, we have only alluded to them for the purpose of pointing out some of the fundamental distinctions between them and private ones.

SEC. 37. **Private corporations — doctrine in reference to legislative control over.** — The doctrine, as to the right of the legislature of the state to affect the corporate rights of public corporations, has no application at common law to private corporations. The acceptance of the charter or act of incorporation for private purposes constitutes a contract, which thereby becomes irrevocable between the parties thereto, viz.: the state and the corporation. There is no necessity for private parties, intended to be benefited by legislative acts of incorporation, to accept the same. They cannot be compelled to accept an offer of corporate privileges. But when once accepted, the rights of the corporation under the same cannot be prejudiced by any subsequent legislation, unless the right so to do has been reserved by the creating charter or act.

[1] Police Jury *v.* Shreveport, 5 La. Ann. 661. See, also, State Bank *v.* Navigation Co., 3 id. 294; Reynolds *v.* Baldwin, 1 id. 162; Haynes *v.* Municipality, 5 id. 760; Board *v.* Municipality, 6 id. 21; East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511; Trustees *v.* Tatman, 13 Ill. 30, in which WOODBURY, J., remarks in reference to municipal corporations: "They are allowed privileges or property only for public purposes. The members are not shareholders nor joint partners in any corporate estate which they can sell or devise to others, or which can be attached or levied upon for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than a compact, and subject to all the legislative conditions named, and therefore to be considered as not violated by subsequent legislative changes." See, also, Ten Eyck *v.* Canal Co., 3 Harr. (N. J.) 200; Hanson *v.* Vernon, 27 Iowa, 28; Regents, etc., *v.* Williams, 9 Gill. & J. (Md.) 365; Norris *v.* Trustees, etc., 7 id. 7; Patterson *v.* Society, etc., 4 Zabr. (N. J.) 385; Baltimore *v.* Board of Police, 15 Md. 376; Penobscot Broom Corporation *v.* Lamson, 16 Me. 224; Yarmouth *v.* North Yarmouth, 34 id. 411; North Yarmouth *v.* Skillings, 45 id. 133; Girard *v.* Philadelphia, 7 Wall. 1. As to the distinction between public and private corporations, see People *v.* Wren, 4 Scam. 273; Holliday *v.* People, 5 Gilm. (Ill.) 216; Richland County *v.* Lawrence County, 12 Ill. 8: Gutzweller *v.* People, 14 id. 142; State *v.* St. Louis County Court, 34 Mo. 564; Lloyd *v.* Mayor, etc., of New York, 5 N. Y. 369; Lowler *v.* Mayor, 7 Abb. Pr. 248; Aurora *v.* West, 9 Ind. 74; Plymouth *v.* Jackson, 15 Penn. St. 44; Tinsman *v.* R. R. Co., 2 Dutch. (N. J.) 148; Marietta *v.* Fearing, 4 Ohio, 427; State *v.* Mayor, etc., 24 Ala. 701; Governor *v.* McEwen, 5 Humph. 241; Grogan *v.* San Francisco, 18 Cal. 590; Darlington *v.* Mayor, etc., 31 N. Y. 164; Saving Fund Society, etc., *v.* Philadelphia, 31 Penn. St. 175; Philadelphia *v.* Field, 58 id. 320; Erie *v.* Canal Co., 59 id. 174; Dinsmore's Appeal, 52 id. 374; Blanding *v.* Burr, 13 Cal. 343.

The contract thus constituted comes within the meaning of the federal constitution, inhibiting the passage of any law impairing the obligation of contracts. And unless there is a reservation of the right to resume or amend a charter or act, contained in it, or in some general law, or in the constitution of the state, thus making it a part of the terms of the contract between the state and the corporators, it comes within the constitutional provision, which secures contracts from being impaired by subsequent legislation.[1] The charter, in such cases, is a contract between the government and the corporation, and the legislature cannot alter, repeal, or in any manner impair, the rights or privileges conferred without the consent of the corporation.[2] In the case of *Dartmouth College* v. *Woodward*, this question was fully considered by the supreme court of the United States, after the most elaborate arguments by eminent counsel.[3] Chief-Justice MARSHALL, upon this question, remarks: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. * * * If the advantages to the public constitute a full consideration for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter given for a valuable consideration, a power (to change or amend it) which is not only not expressed, but is in direct contradiction to its express stipulations. * * * This is plainly a contract to which the donors, the trustees and the crown (to whose rights and

[1] Mechanics' Bank *v.* Debolt, 1 Ohio St. 591; State *v.* Southern, etc., R. Co., 24 Tex. 80; Const., art. 1, § 10.

[2] Young *v.* Harrison, 6 Ga. 130; Maysville Turnpike Co. *v.* How, 14 B. Monr. 426; Commercial Bank *v.* State, 14 Miss. 599; New Orleans, etc., R. Co. *v.* Harris, 27 id. 517; Backus *v.* Lebanon, 11 N. H. 19; Zabriskie *v.* Hackensack, etc., R. Co., 18 N. J. Eq. 178; Bank of State *v.* Bank of Cape Fear, 13 Ired. (S. C. L.) 75; Commonwealth *v.* Cullen, 13 Penn. St. 133; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518. The charter of a private corporation is something more than a law, in that it contains stipulations which are terms of contract between the state as one party and the corporation as the other, and is as much removed from the modifying influences of the legislature as would be contracts between two private parties. Flint *v.* Woodhull, 25 Mich. 99.

[3] 4 Wheat. 518.

obligations New Hampshire succeeds) were the original parties. It is a contract made upon a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. * * * The opinion of the court, after mature deliberation, is, that this [the charter] is a contract, the obligation of which cannot be impaired [by legislative acts] with out violating the constitution of the United States."

It may be affirmed, under the doctrine of irrevocable contract, as established in the Dartmouth College case, that, in all cases of corporate grants, that are not solely for the purpose of furnishing machinery for the government, but for private purposes and objects, if accepted, they constitute contracts between the state and the corporators; the consideration of the grant received by the state being the general public benefit to be derived incidentally from the prosecution of the objects of the corporation, and the duties which it assumes in accepting of the grant; and the corporate powers and privileges can no more be resumed or impaired, without the consent of the corporators, than any grant of property or other valuable thing, unless, as we have suggested, such right so to do be reserved in the charter or act creating it, or in some general statute, or in the constitution of the state.[1]

SEC. 38. **Immunity does not exempt property from regulation, or prohibit a change of remedies.**—But even in case there is no reservation of the right to resume, change, or abridge the powers conferred on a private corporation, the legislature still possesses the power to regulate the sale of its property and prescribe the methods and extent of its legal remedies, the same as it might those of a natu-

[1] Id. See, also, Trustees, etc., *v.* Indiana, 14 How. (U. S.) 268; Planters' Bank *v.* Sharp, 6 id. 301; Piqua Bank *v.* Knoop, 16 id. 369; Binghamton Bridge Case, 3 Wall. 51; Norris *v.* Trustees, etc., 7 G. & J. 7; Grammar School *v.* Burt, 11 Vt. 632; People *v.* Manhattan, 9 Wend. 351; Commonwealth *v.* Cullen, 13 Penn. St. 133; Commercial Bank, etc., *v.* State, 14 Miss. 599; Backus *v.* Lebanon, 11 N. H. 19; Edwards *v.* Jagers, 19 Ind. 407; State *v.* Noyes, 47 Me. 189; Braffett *v.* G. W. R. Co., 25 Ill. 353; People *v.* Jackson, etc., R. Co., 9 Mich. 285; Bank of State *v.* Bank of Cape Fear, 13 Ired. 75; Mills *v.* Williams, 11 Ind. 558; Hawthorn *v.* Calef, 2 Wall. 10; Wales *v.* Stetson, 2 Mass. 143; State *v.* Tombeckbee Bank, 2 Stew. 30; Central Bridge *v.* Lowell, 15 Gray, 106; Bank of the Dominion *v.* McVeigh, 20 Gratt. 457; Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. 78; City of Covington *v.* Covington, etc., Bridge Co., 10 Bush (Ky.), 69; Allen *v.* Buchanan, 9 Phil. (Penn.) 283; State *v.* Accommodation Bank, 26 La. Ann. 288.

ral person.[1] They have immunity from injury to their absolute rights, but not such incidental injuries as may flow from a change of remedies;[2] and like a natural person they are subject to those regulations which a state may reasonably prescribe for the safety or good government of the community.[3] Thus, a corporation may be compelled to fence its railroad track;[4] and in Massachusetts it has been held that the legislature might prohibit the sale of malt liquors by statute,[5] as a proper police regulation, and that the prohibition extended to and affected the privileges of a corporation in that respect as well as natural persons, although such corporation was instituted for the purpose of brewing malt liquors, and the legislature possessed no power to resume or repeal the charter.[6] And, even in the absence of any reserved powers, the legislature may provide a remedy more effectually to compel a corporation to perform its duties, and prescribe the manner in which, the time when, and the court where, such remedy may be enforced.[7]

SEC. 39. **Power of the legislature to regulate the charges of railroads.**— The question whether the legislature can regulate and control the rates of fare and freights of railroad companies has recently been the subject of general interest and controversy as well as of judicial investigation; and it has been determined by the supreme court of the United States, that such regulation may be made, unless the railroad company is protected therefrom by a special provision of its charter or by the general statutes, under which it is organized. That court has determined that a railroad company can only charge a reasonable fare or freight as a common carrier,

[1] Bank of Republic *v.* Hamilton, 21 Ill. 53.

[2] Reapers' Bank *v.* Willard, 24 Ill. 433.

[3] Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548; Coffin *v.* Rich, 45 Me. 507; State *v.* Noyes, 47 id. 189. See, also, *Ex parte* R. Co., 37 Ala. 679. The general power of the legislature to legislate for the protection of the life, health and safety of the inhabitants of a state cannot be the subject of an irrevocable grant by it. Dingman *v.* People, 51 Ill. 277.

[4] Gorman *v.* Pacific R. Co., 26 Mo. 441. So, its powers may be enlarged. Gifford *v.* N. J. R. Co., 10 N. J. Eq. 171.

[5] Stat. Mass. 1869, ch. 415.

[6] Commonwealth *v.* Liquors, 115 Mass. 153.

[7] Gowen *v.* Penobscot R. Co., 44 Me. 140. See, also, Cummings *v.* Maxwell, 45 id. 190; Taggart *v.* Western, etc., R. Co., 24 Md. 563. And the charter is not impaired by an act of the legislature providing for the redress of injuries occasioned by the negligence or misconduct of railroad or other corporations. Board, etc., *v.* Scearce, 2 Duv. (Ky.) 576.

which in the absence of legislative determination must be fixed by the courts; and that the legislature has the authority to fix the maximum rates of charges for the same, in the absence of any express provision limiting the power, either contained in the general law or charter of incorporation of such company. It is claimed that this doctrine is entirely consistent with the inviolability of the contract of the state with the company incorporated; and that, in the absence of any reserved power in the legislature, it would have a right to regulate and fix the maximum charges for transportation, the same as though the carrier was a natural person. Thus, the Burlington and Missouri Railroad Company was organized under the general incorporation law of Iowa, and subsequently the plaintiff, the Chicago, Burlington and Quincy Railroad Company, succeeded to the rights of the former, and power was conferred upon the said company to contract in reference to its business, the same as a private individual, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but subject to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. In a recent case against said company it was held, by the supreme court of the United States, that railroad companies are common carriers for hire; that they are given extraordinary powers in order the better to serve the public in that capacity; that they are engaged in a public employment affecting the public interest, and are therefore subject to legislative control; that in the transaction of business they have the same rights and are subject to the same control as private individuals under the same circumstances; that it would be their duty to carry when called upon so to do, and that they can charge only a reasonable sum for carriage; that in the absence of any legislative regulation upon the subject the courts must decide for them as they do for private persons, when controversies arise on this subject, what is a reasonable charge; that when the legislature prescribes a maximum charge for fare or freight it operates upon the corporation as it would upon an individual engaged in a similar business; that it is within the power of the company to call upon the legislature to fix permanently the limit of charges of carriage, and make it a part of the charter, and if it is refused, to abstain from accept-

ing the grant or engaging in the business; that if fixed by the legislature at the time of the grant or acceptance of the act, it might have presented a contract in that respect, with which the legislature could not interfere; but that, as this was not done in this case, the company invested its capital, relying upon the good faith of the people and the wisdom of legislators, against any wrong in the form of legislative regulation.[1]

SEC. 40. Although there seems to have been a provision in the charter of the original railroad company to the rights and privileges of which the plaintiff succeeded, reserving a right in the legislature to make rules and regulations in relation to the company, still the supreme court seems to rest its opinion upon the ground of the power of the legislature to regulate the charges, and to determine what is reasonable in that respect, or fix the maximum of charges of fare and freight, independent of any reserved right so to do, contained in the express statutory or constitutional law; that such corporations stand the same as natural persons in this respect; and that there is a right in the legislature to determine what are reasonable charges for individuals, in all those occupations and employments, in which persons are engaged affecting the public interest, as in the case of public ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and warehousemen. The decision in this case is, in fact, based upon the same reasons, as a decision made at the same term of the court in relation to the right of the legislature to regulate by statute the charges of the owners of warehouses, in which grain is stored in bulk, and "in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved," in Chicago and other places, and to fix the maximum charges for the same.[2] In the case last referred to, it was claimed, that such a statute was repugnant to that part of the constitution of the United States, which confers upon congress the power to regulate commerce with foreign nations and among the

[1] The Chicago, etc., R. Co. *v.* State, West. Jur. No. 4, Apr. 1877, to appear in 4 Otto (U. S.)

[2] Munn *v.* The People, not yet published in U. S. Reports; Alb. Law J., vol. 15, p. 180; West. Jur., Apr. 1877; to appear in 4 Otto (U. S.)

several states;[1] and to that part of the constitution, which provides that no preference shall be given by any regulation of commerce or revenue, to the ports of one state over another;[2] and to that part of the amendment of the constitution, which ordains that no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[3] After able arguments by counsel, and a full consideration of the case by the court, it was held that a law of the state, regulating warehousing, and the inspection of grain, and fixing the maximum of charges for the storage of grain in warehouses, was constitutional, and not repugnant to that part of the fourteenth amendment of the constitution, which ordains that no state "shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

SEC. 41. The learned chief-justice, in delivering the opinion of the court in this case, observes: "Looking then to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati*, only." This was said by Lord Chief-Justice HALE more than two hundred years ago,[4] * * * and has been accepted without objection as an essential element of the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good and to the extent of the interest thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control. Thus, as to ferries, Lord HALE says, in his treatise, *De Jure Maris* (1 Harg. Law Tracts, 6), the king has 'a

[1] Const. U. S., art. 1, § 8.
[2] Id., art. 1, § 2.
[3] Const. U. S., XIVth Amend.
[4] *De Partibus Maris* (1 Harg. L. T. 18).

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right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth not in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz.: that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable.' So, if one owns the soil and landing places on both banks of a stream, he cannot use them for the purpose of a public ferry, except upon such terms and conditions as the body politic may from time to time impose, and this, because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare. And again, as to wharves and wharfingers, Lord HALE says: 'A man for his own private advantage may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, or pesage; for he doth no more than is lawful for any man to do, viz.: make the most of his own. * * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the queen, * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case, there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street on his own land, it is no longer a bare private interest, but is affected by a public interest.' This statement of the law by

Lord HALE was cited with approbation and acted upon by Lord KENYON, at the beginning of the present century, in *Bolt* v. *Stennett*, 8 T. R. 606."

SEC. 42. It is evident that the general reasoning, as well as the decisions, which would subject wharfingers to legislative control, on the ground of the public character of their employment, would be equally applicable to warehousemen, innkeepers, bakers, millers, cartmen, and common carriers, generally. Upon this question Lord ELLENBOROUGH once observed: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he has a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actual existing state of things in the port of London, they alone having the warehousing of these wines, be not, according to the doctrine of Lord HALE, obliged to limit themselves to a reasonable compensation for such warehousing."[1]

SEC. 43. The general principle which allows legislation in these cases on the ground of the public nature of the property or business in which the person is engaged, would be particularly applicable to common carriers; and especially to that class of them which operates our railroads. Their business is particularly "affected with a public interest." Their property is employed in a manner that directly affects the body of the people. The corporate franchise is granted, and extraordinary powers conferred on such corporations, in order that they may the better serve the public in the capacity of common carriers; they are certainly engaged in a public employment which affects the public

[1] Allnut *v.* Inglis, 12 East, 527. See, also, opinion of LE BLANC, J., in the same case, p. 541; Mobile *v.* Yuille, 3 Ala. (N. S.) 140, where the right to regulate the weight and price of bread was sustained.

interest, and are within the reasoning of those class of cases, where the right of legislative control and regulation has uniformly been recognized.[1]

[1] See Eng. Stat. W. & M., c. 12, s. 24; 8 Stat. at Large (Great Britain), 481; New Jersey Nav. Co. *v.* Merchants' Bank, 6 How. 382; where it was held that common carriers exercise a sort of public office, and have duties to perform in which the public is interested.

The opinion of the learned chief-justice in Munn *v.* The People, already referred to, is so clear and satisfactory on this question, and illustrates the application of the principle on which the right of legislative control is based so well, in cases of warehousemen as well as in cases of common carriers, that I insert the concluding portion of it. He observes: "Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error and the business which is carried on there come within the operation of this principle. For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that the great producing region of the 'west and northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessels for transportation to the seaboard by the great lakes, and some of it is forwarded by rail way to the eastern ports. * * * Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. * * * The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called *elevators*, because the grain is *elevated* from the boat or car by machinery operated by steam, into bins prepared for its reception, and *elevated* from the bins by like process into the vessel or car which is to carry it on * * * In this way the largest traffic between the citizens north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way trade in grain is carried on by the inhabitants of seven or eight of the great states of the west, with four or five states lying on the sea shore, and forms the largest part of the inter-state commerce in these states. The grain warehouses, or elevators, in Chicago, are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. * * * They are located with the river harbor on one side and the railway tracks on the other, and the grain is run through them from car to vessel, or boat or car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable and redeemable in like kind upon demand. This mode of conducting business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the common carrier; the owership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit. In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and

SEC. 44. It is evident that the legislature has the right to regulate the prices of railroad companies, and especially to fix the maximum rates which they may charge for fare and freight, even

which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year then next ensuing such publication.' Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the west' must pass on the way 'to four or five of the states on the sea-shore,' may be a *virtual* monopoly. Under such circumstances it is difficult to see why, if the carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage "pays a toll which is a common charge,' and therefore, according to Lord HALE, every such warehouseman 'ought to be under public regulation, viz., that he * * take but reasonable toll.' Certainly, if any business can be clothed with a public interest, and cease to be *juris privati* only, this has been. It may not be made so by the constitution of Illinois or this statute, but it is by the facts. We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their constitution in 1870, saw fit to make it the duty of the general assembly to pass laws 'for the protection of the producers, shippers and receivers of grain and produce' (art. 13, § 7), and by section 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it may be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present immense proportions something had occurred which led the whole body of the people to suppose that remedies, such as are usually employed to prevent abuse by virtual monopolies, might not be inappropriate here. For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we must declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge. Neither is it a matter of any moment that no precedent can be found for a statute precisely like this.

It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it, in this particular manner. It matters not in this case, that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authori-

when the right to regulate and control them, or to amend or repeal their charters, is not contained in the act or general statutes under which they are instituted or created. The doctrine is that the

ties for the common good. They entered upon their business and provided themselves with the means to carry it on, subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney carriage, and as to him, it has never been supposed that he was exempt from regulating statutes and ordinances, because he had purchased his horses and carriage, and established his business before the statute or ordinance was adopted. It is insisted, however, that the owner of property is entitled to reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. It has already been shown the practice has been otherwise. In countries where the common law prevails, it has been customary, from time immemorial, for the legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps, more properly speaking, to fix a maximum, beyond which, any charge made would be unreasonable. Undoubtedly, in mere private contracts relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms or forego the use. But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest in any rule of the common law. This is only one of the forms of municipal law, and is no more sacred than any other. Rights of property, which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adopt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in law, but only gives a new effect to an old one. We know that this is a power which may be abused, but this is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts. After what has already been said, it is unnecessary to refer at length to the effect of other provisions of the fourteenth amendment, which is relied upon, viz.: That no state shall 'deny, to any person within its jurisdiction, the equal protection of the laws.' Certainly it cannot be claimed that this prevents the state from regulating the fares of hackmen, or the charges of draymen, in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case cannot, in this particular, be done in the other. We come now to consider the effect upon this statute of the power of congress to regulate commerce. It was very properly said, in the case of the State Tax on Railway Gross Receipts (15 Wall. 293), that 'it is not every thing that affects commerce that amounts to a regulation,

legislature creating them, or by or under whose acts they are created, may regulate and fix the maximum or reasonable charges which they may receive, the same as though they were private persons; and that such regulation is not any violation of the corporate contract, or any infringement of the constitutional rights of the corporation, whose charges are thus fixed or regulated.

The right of the legislature to regulate the charges of a private person engaged in an employment of general public interest or concern, seems to be settled by a uniform current of decisions, and there would seem to be no reason, based upon principle or any sound public policy, against the right of the legislature to provide for and regulate the rates of fare and freight of incorporated companies, organized and instituted for the purpose of carrying persons or property. In fact, the reason for the application of the doctrine we have referred to would be stronger in that case than in case of mere private and individual concerns, whose business is less extensive, such as draymen, hackney coachmen, etc.; as railroad corporations have, by virtue of the corporate franchises conferred upon them, although of a private character, the right to condemn and appropriate private property for their private purposes, on the condition that they make compensation for the same to the owner.[1]

within the meaning of the constitution.' The warehouses of these plaintiffs in error are situated, and their business carried on exclusively, within the limits of the state of Illinois. They are used as instruments by those engaged in state, as well as by those engaged in inter-state commerce; but they are no more necessarily a part of commerce itself, than the dray or cart, by which, but for them, grain would be transferred from one railroad station to another. Incidentally, they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until congress acts in reference to their inter-state relations, the state may exercise all the powers of the government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of congress, in respect to inter-state commerce; but we do say, that upon the facts as they are presented to us in this record, that has not been done. The remaining objection, to wit, that the statute in its present form is repugnant to section 9, article 1 of the constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by a single remark, that this provision operates only as a limitation of the powers of congress, and in no respect affects the states in the regulation of their domestic affairs."

[1] See *post*, ch. 17.

SEC. 45. **Subsequent grants — construction of charters.** — The granting of franchises to a private corporation does not ordinarily prevent future grants of the same character to others. The general doctrine is, that if a grant is accepted, it becomes a contract between the state and the corporators, yet the courts in the construction of such contracts will not, by implication, extend the powers of corporations beyond the express provisions of the grant or such as are necessarily implied in order to carry out those expressly conferred. Thus, the grant of authority by a legislature to a turnpike corporation, to construct a road between two places, and collect tolls thereon, would not preclude the same legislature from conferring similar powers upon other companies, for different routes between the same places. This doctrine is illustrated by the opinion of the supreme court of the United States in the case of *Charles River Bridge* v. *Warren Bridge*.[1] In this case a charter of the legislature of Massachusetts conferred upon certain persons authority to construct a bridge over Charles river, thereby connecting Boston and Charlestown, with the right to collect tolls, but without provisions conferring special powers, or restricting future legislative action, and such bridge was built by said corporation, and the legislature subsequently incorporated another company to build the Warren bridge across the same river, and near the former one, and said latter company were proceeding to build such bridge, when the former filed a bill for an injunction, and also for general relief, on the ground that the second charter impaired the obligations of the former charter, but it was dismissed.[2] And this decision was affirmed in the supreme court of the United States. Chief-Justice TANEY in this case, referring to the charter of the proprietors of the Charles river bridge, and the rules of construction of such charters, observes: "This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge, and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles river, above or below their bridge. No right to erect another

[1] 11 Pet. 420.

[2] 7 Pick. 344.

bridge themselves, or prevent other persons from erecting one. No engagement from the state that another shall not be erected, and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all of these subjects the charter is silent. No words are used from which an intention to grant any of those rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant, and cannot be inferred from the words by which the grant is made. The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles river bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would otherwise have gone over it, and renders their franchises of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain, and that they impaired, or in other words, violated that contract, by the erection of the Warren bridge. The inquiry is, does the charter contain such a contract on the part of the state? Is there such a stipulation to be found in that instrument? * * * If a contract on that subject can be gathered from the charter it must be by implication, and cannot be found in the words used. Can such an agreement be implied? In such charters no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey." [1]

[1] It is further observed by the learned justice in this case, as follows: "Turnpike roads have been made succession on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introducing

But this doctrine does not obtain where the charter expressly provides for exclusive privileges, and confers franchises of an extraordinary character. And a railroad corporation, upon which have been conferred such exclusive and extraordinary privileges and franchises, may maintain an action in equity, for any disturbance of them. Thus, where it was provided in the charter of such a corporation, "that no other railroad than the one hereby granted shall, within thirty years from and after the passing of this act, be authorized to be made, leading from Boston, Charlestown or Cambridge to Lowell," it was held that this constituted a contract by the state with the Boston and Lowell Railroad Corporation, and that no other railroad from Boston, Charlestown or Cambridge to Lowell could be lawfully incorporated within thirty years, and that such a condition was binding upon subsequent legislatures of that State.[1]

of newer and better modes of transportation, and traveling. In some cases railroads have rendered the turnpike roads on the same line of travel so useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded or any contract violated on the part of the state. Among the multitude of cases which have occurred and been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither states, nor individuals, nor corporations, ever imagined that such a contract could be implied from such characters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party."

[1] Boston & Lowell R. Co. v. Salem & Lowell R. Co., 2 Gray, 1. In this case the supreme court, per SHAW, C. J., say: "In construing this act of incorporation, we are to bear in mind the time and circumstances under which it was made, but more especially to take into consideration every part and clause of the act, and deduce from it the true meaning and intent of the parties. The act, like every act and charter of the same kind, is a contract between the government on the one part, and the undertakers, accepting the act of incorporation, on the other; and therefore what they both intended, by the terms used, if we can ascertain it, forms the true construction of such contract. * * * The question is, does this provision confer any exclusive right, interest, franchise or benefit on this corporation? It is found in the same act; the whole is presented at once to the consideration of the corporators, to be accepted or rejected as a whole; and this would of course constitute a consideration in their minds, in determining whether to accept or reject the charter. If it adds any thing to the value and benefit of the franchise, such enhanced value is part of the price which the public propose to pay, and which the undertakers expect to receive, as their compensation for furnishing such public improvement.

SEC. 46. **Reservation of power in the legislature.** — The inviolability of the contract secured by incorporation, and the disability of the state, through its legislature, to resume or in any

"This is a stipulation of some sort, a contract, by one of the contracting parties, to and with the other; in order to put a just construction upon it, we must consider the character and relations of the contracting parties, the subject matter of the stipulation, and its legal effect upon their respective rights. It was made by the government, in its sovereign capacity, with subjects, who were encouraged by it to advance their property for the benefit of the public. It was certainly a stipulation on the part of the government regulating its own conduct, and putting a restraint upon its own power to authorize any other railroad to be built, with a right to levy a toll, and of course, no other such road could lawfully be made. It was, therefore, equivalent to a covenant for quiet enjoyment against its own acts, and those of persons claiming under it. This is, in fact, all that the government could stipulate. It could not covenant with the corporation for quiet enjoyment against strangers and intruders, against the unauthorized and illegal disturbance of their rights by third parties; against these, they would have their remedy in the general laws of the land."

The same doctrine was also held in The Binghamton Bridge Case, 3 Wall. 51. DAVIS, J., in the opinion in this case, observes:

"The constitution of the United States declares that no state shall pass any law impairing the obligation of contracts; and the 25th section of the judiciary act provides that the final judgment or decree of the highest court of a state, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the state, on the ground of its being repugnant to the constitution of the United States, and the decision was in favor of its validity.

"The plaintiffs in error brought a suit in equity in the supreme court in New York, alleging that they were created a corporation by the legislature of that state, on the 1st of April, 1808, to erect and maintain a bridge across the Chenango river, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the state, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the 5th of April, 1855, in plain violation of the contract of the state with them, authorized the defendants to build a bridge across the Chenango river within the prescribed limits, and that the bridge is built and open for travel.

"The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company from using or allowing to be used the bridge thus built, on the sole ground that the statute of the state which authorizes it is repugnant to that provision of the constitution of the United States which says that no state shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case finally reached and was heard in the court of appeals, which is the highest court of law or equity of the state in which a decision of the suit could be had. And that court held that the act by virtue of which the Binghamton bridge was built was a valid act, and rendered a final decree dismissing the bill. Every thing, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a state court and to support the writ of error, which seeks to re-examine and correct the final judgment of the court of appeals in New York.

"The questions presented by this record are of importance, and have received deliberate consideration.

"It is said that the revising power of

way modify or control the powers thus conferred, although they may have been the result of unwise, hasty or corrupt legislation, has created apprehensions of danger from the power that

this court, over state adjudications is viewed with jealousy. If so, we say, in the words of Chief-Justice MARSHALL, 'that the course of the judicial department is marked out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it.' The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if any thing was settled by an unbroken course of decisions in the federal and state courts, it was, that an act of incorporation was a contract between the state and the stockholders. All courts, at this day, are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken.

"A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt, even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of Dartmouth College *v.* Woodward, 4 Wheat. 418, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

"The principle is supported by reason as well as authority. It was well remarked by the chief-justice, in the Darmouth College case, 'that the objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant.' The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on government to provide for them; and as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

"It is argued, as a reason why courts should not be rigid in enforcing the contracts made by states, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

"If the knowledge that a contract made by a state with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

"A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention

may thus be created;[1] and to guard against and protect the government and the interest of the people therefrom, provisions are now usually found in the constitutions of various states of the Union, preventing the creation of corporations, except subject to the right of the legislature to repeal or amend the same; and not unfrequently the special or general law creating them, contains a clause, reserving the right of the legislature to control such corporation and amend, alter, abridge, regulate or withdraw the rights, privileges and powers conferred.[2] In such cases the legislature could alter, change, set aside, abridge, or regulate the corporate powers and franchises without any violation of the contract or of constitutional rights.[3]

of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River Bridge, 11 Peters, 544, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several states are nearly all the same way. The principle is this: that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts."

[1] Cooley on Const. Lim. 27, n. 2. Of the power of the legislature to preclude itself from exercising in future any of the essential attributes of sovereignty, see Cooley on Const. Lim. 280, 290, and notes. See, also, construction of the New York Const. in connection with an act of the legislature relating to railways in streets, in the New York court of appeals, in the case of Matter of the Gilbert Elevated Railroad Co., Alb. Law. J., v. 16, p. 204.

[2] Code Iowa, § 1090; Const. Ia., art. 8, § 12. New York Const., art. 8, § 1; 2 R. S. 497, § 8, 5th ed. If the power to revoke corporate charters is contained in the constitution, it need not be contained in the charter. Delaware, etc., R. Co. *v.* Tharp, 5 Harr. (Del.) 454.

[3] West Wisconsin R. Co. *v.* Supervisors, etc., 35 Wis. 257. But constitutional or statutory provisions could not have a retroactive effect. Id.; Hamilton *v.* Keith, 5 Bush (Ky.), 458; Griffin *v.* The Kentucky Co., 3 id. 592.

If the corporate rights are conferred subject to the reserved right of the legislature to modify or repeal them, the rights and powers conferred are mere privileges, subject to be withdrawn at any time at the will of the legislature;[1] and the right may be exercised in any manner and to any extent that may be deemed proper. If the corporation is a railroad company, it may, under a general reservation, make changes in the level, grade and connections of the road, direct the construction of new connecting tracks, and provide in what manner, and under whose supervision the work shall be done and how paid for.[2] And in such cases, not only the original corporators, but the subsequent stockholders and bondholders, whose bonds are secured by mortgages, will be held to have acquired their respective rights, with knowledge of, and subject to the reserved right of the legislature to alter or resume the powers and franchises conferred upon the corporation.[3]

[1] State *v.* Commissioners, 37 N. J. L. 228.

[2] Fitchburgh, etc., R. Co. *v.* Grand Junction, etc., R. Co., 4 Allen, 198. See, also, Hyatt *v.* McMahon, 25 Barb. 457.

[3] West Wisconsin R. Co. *v.* Supervisors, etc., 35 Wis. 257. But it cannot compel the corporators to accept of an amendment, though it may destroy the corporation. If the original powers are changed or modified, they must accept the same as modified or cease to transact business in a corporate capacity. Yeaton *v.* Bank of the Old Dominion, 21 Gratt. (Va.) 593. See, also, as to power to alter or amend, Commissioners, etc., *v.* Holyoke Water Power Co., 104 Mass. 446.

Under a reserved authority in the legislature contained in constitutions, general or special laws, or in the charters of corporations, the question has been presented, whether the legislature can authorize a change of the objects and purposes for which the corporation was created, without the unanimous concurrence of all the stockholders. In New York, Massachusetts, Illinois and Missouri, from the current of decisions, it would appear that in the exercise of the reserved right of the legislature, it may authorize the corporation to engage in a new enterprise, or extend the objects and purposes of the old one, without the assent or concurrence of all the members, and even against the protest of a minority of them. See Northern R. Co. *v.* Miller, 10 Barb. 260; White *v.* Syracuse, etc., R. Co., 14 id. 559; Schenectady, etc., Plank-road Co. *v.* Thatcher, 11 N. Y. 102; Buffalo, etc., R. Co. *v.* Dudley, 14 id. 336; Durfee *v.* Old Colony R. Co., 5 Allen, 230; Basset *v.* Alton, etc., R. Co., 13 Ill. 504; Pacific R. Co. *v.* Hughes, 22 Mo. 291. But a contrary doctrine seems to prevail in Wisconsin, New Jersey and Maine; and it is there held that, while the legislature may, under the reserved right, grant the power to embark in new enterprises, not contemplated in the original corporation, the corporation cannot be compelled to use the franchise thus conferred, nor can the majority of the corporators carry out the powers thus conferred, against the will of any member. Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13; Zabriskie *v.* Hackensack, etc., R. Co., 3 C. E. Green, 178, Oldtown, etc., R. Co. *v.* Veazie, 39 id. 571. See, also, Delaware, etc., R. Co. *v.* Tharp, 1 Houst. (Del.) 149; 5 id. 454.

SEC. 47. **Right to resume based upon misuse or abuse of its franchise.** — Where a charter provides, that if the corporation shall at any time misuse or abuse its franchises, the legislature may revoke the grant, it has been recently held, that the power of revocation is thereby made conditional, upon some misuse or abuse, and that this fact must be proved upon some inquiry, giving the corporation an opportunity to be heard in defense, before the charter can be revoked.[1]

SEC. 48. **The power to resume cannot be exhausted.** — A reservation of the right to resume, repeal or alter a corporate charter, or grant, has none of the characteristics of a mere power, which when once exercised is exhausted; but its effect is upon the legislative grant itself to prevent it from becoming, what it would become without the limitation, namely, an irrevocable contract between the state and the corporation.[2]

SEC. 49. **General statutes reserving power.** — A statute which in general terms provides, that the legislature may resume or amend charters, or control corporations, will authorize the legislature to exercise this power, though the corporate act under which a corporation is created contains no express limitations of its power, nor any provision in relation to such reserved powers. And a charter granted after the passage of a general act subjecting all charters thereafter granted to amendment or changes, in the discretion of the legislature, is subject to alteration although the

[1] Baltimore *v.* Pittsburg, etc., R. Co., 3 Pittsb. 20. The court suggests in this case, that the proper mode for the legislature to proceed, in such a case, would be to pass a resolution directing the attorney-general to institute the proper proceedings in the courts to ascertain the facts; and that if in such proceeding the charge be found true, the charter should be revoked. See, also, Commonwealth *v.* Pittsburg, etc., R. Co., 58 Penn. St. 26, where it was held, that the legislature was not the final judge of the sufficiency of the causes for a repeal of a charter, based upon a charge of misuse or abuse of the same. See, also, Crease *v.* Babcock, 23 Pick. 334; Commonwealth *v.* Essex Co., 13 Gray, 239; State *v.* Curran, 7 Eng. (Ark.) 321; Delaware R. Co. *v.* Tharp, 5 Harr. (Del.) 454. But in Miners' Bank *v.* United States, 1 Greene (Ia.), 553, it was held, in a similar case, that the legislature was the proper judge as to the fact of misuse and abuse, and of the right to resume the powers conferred, on their own judgment of the facts; and that their act and motives, or the sufficiency of the evidence on which they acted, could not be collaterally questioned in the courts. See, also, *post*, ch. 20.

[2] State *v.* Commissioners, etc., 37 N. J. L. 228.

charter or act creating it does not expressly refer to the act containing the reserved power.[1]

SEC. 50. **Amendments of charters.** — If there is a reserved right to resume the charter or amend the provisions of the statutes under which corporations are instituted, and the legislature by virtue of such authority amends the charter or statutes, the corporation has a discretion whether to accept or not the grant as amended; and the granting of new franchises to an existing corporation is inoperative until accepted.[2] If the corporation accepts of such an act, it must do so in an unqualified manner; there cannot be a partial acceptance of the requirements and conditions of statutes granting corporate privileges.[3]

Where the defendants, who were a corporation, had received a charter, subject to the right of amendment or appeal, which gave them authority to construct and use a railroad terminating in the city of New Haven, and provided that the construction of that part of the road within the limits of the city should be subject to such regulations as the common council of the city should prescribe, and they constructed their road and built bridges within and to the acceptance of the city, and an act was subsequently passed by the legislature authorizing the common council of the city to order the bridges widened in such a manner as the public convenience might require, and to enforce such order, it was held that the act was not unconstitutional, as impairing the obligation of the contract of the state with the company, or as taking their

[1] Bangor, etc., R. Co. v. Smith, 47 Me. 34; State v. Person, 32 N. J. L. 134. See, also, Oliver, Leet & Co.'s Bank, 21 N. Y. 9; Commonwealth v. Fayette R. Co., 55 Penn. St. 452.

[2] Yeaton v. Bank of the Old Dominion, 21 Gratt. (Va.) 593; Commissioners, etc., v. Holyoke Water Power Co., 104 Mass. 446; Lyons v. Orange, etc., R. Co., 32 Md. 18; Kenton County v. Bank Lick Townp. Co., 10 Bush, 529. And a right reserved by the legislature in an original act of incorporation, to alter a charter, was held to confer power to impose a tax on the capital stock of the company, notwithstanding a supplemental act, that the "capital stock and dividends" of that kind of corporations should not be taxable. Union Improvement Co. v. Commonwealth, 69 Penn. St. 140. See, also, State v. Mayor, etc., 35 N. J. L. 157.

[3] Id. See, also, *ante*, § 31. Where there is a general power of repeal of corporate charters, contained in the constitution of a state, and there is also a power reserved to the legislature, contained in the act creating the corporation, the power contained in the constitution is sufficient authority for the exercise of this power as well as the act of incorporation, and a retroactive statute affecting corporations created under an act providing therefor, is constitutional. Oliver, Leet & Co.'s Bank, 21 N. Y. 9. A change of the constitution cannot affect a vested right. Id. See, also, Reciprocity Bank, 29 Barb. 369; same, 17 How. (N. Y.) Pr. 323; Commonwealth v. Erie, etc., R. Co., 27 Penn. St. 339.

property without compensation.[1] And where the legislature enlarged the powers of a corporation with the assent of the stockholders, it was held that no one stockholder, by refusing his assent, could hinder the exercise of the enlarged powers.[2]

SEC. 51. **Repeal of charter.** — Although a state enactment exempting a corporation from taxation, if absolute, may be operative as a contract, so that it cannot be abrogated by subsequent legislation, yet where, instead of being absolute, the charter is accepted, subject to the general law of the state, that all corporate charters shall be subject to amendment or repeal by the legislature, a subsequent legislature may revoke it.[3] So, a state legislature has power to pass a law affecting the interests of a corporation, under a general power reserved by a law antedating the charter, providing the charter is subject to amendment or repeal; and the objection in such a case, that the subsequent legislation amending the charter impairs the obligation of the contract, will not avail.[4]

SEC. 52. **General implied powers of corporations.** — The creation of a corporation under a special or a general statute would carry with it, by implication, all the common-law incidents and powers of a corporation, unless there was some limitation contained in the law at the time. These common-law incidents and powers, as we have before observed, are the right of perpetual succession, to sue and be sued, to grant and receive in the corporate name, to purchase and hold real and personal property, to have a common seal, and to make by-laws.[5]

SEC. 53. **Powers conferred or limited by statutes.** — The powers and privileges of corporate bodies are, however, usually limited

[1] English *v.* New Haven, etc., R. Co., 32 Conn. 240; Buffalo, etc., R. Co. *v.* Dudley, 4 Kern. 336. See, also, People *v.* Grand, etc., Plank R. Co., 10 Mich. 400.

[2] Curry *v.* Scott, 54 Penn. St. 270. If the alterations be fundamental, the acceptance must be unanimous. State *v.* Accommodation Bank, etc., 26 La. Ann. 288. But see *ante*, § 46, and notes.

[3] Tomlinson *v.* Jessup, 15 Wall. 454. See, also, Tomlinson *v.* Branch, id. 460.

[4] Tomlinson *v.* Branch, *supra*; Miller *v.* State, 15 Wall. 478; Holyoke *v.* Lyman, id. 500.

[5] 1 Bl. Com. 475; Kyd on Corp. 13, 69, 70. See, also, Penobscot Boom Corp. *v.* Lamson, 16 Me. 24. So, at common law, corporations could take property by all the usual methods of acquiring it. Sherwood *v.* American Bible Society, 4 Abb. Ct. App. Dec. 227.

and controlled by the creative statutes.[1] These may extend, or limit and restrain, the corporate common-law powers and privileges. The legislative authority in this respect is restrained only by constitutional provisions. The charter or statute is the fundamental law of the corporate existence; and usually specifies the powers which it is intended to confer, the mode of exercising, resuming or amending or modifying the same. The acceptance of a grant of corporate powers is, of course, an acceptance of all the requirements and conditions of it, and there can be, as we have noticed, no qualified or conditional acceptance of it, or of any amendment of the same.[2]

The powers and franchise conferred by the grant of corporate privileges, whether at common law or under the statutes, are of three kinds, namely: those granted in express words; those necessarily implied in, or incident to, the powers expressly granted, and those essential to the objects and purposes of the grant.[3]

In this respect the same rules of construction would be applicable to a municipal as to a private corporation. No powers can be exercised except such as are conferred, and in case of reasonable doubt it must be decided against the corporation. If a power is exercised which is not authorized, it is ultra vires and void. But we will consider this subject hereafter. On the subject of corporate powers and rights, and the rules of construction of corporate charters, Mr. Justice CHURCH very forcibly and accurately observes: "In this country all corporations, whether public or private, derive their powers from the legislative grant, and can do no act for which authority is not expressly given or

[1] Perrine *v.* Chesapeake, etc., Canal Co., 9 How. 182. See, also, Haynes *v.* Covington, 21 Miss. 408.

[2] Farmers' Loan & Trust Co. *v.* Carroll, 5 Barb. 613; The Bushwick, etc., Co. *v.* Ebbetts, 3 Edw. (N.Y.) 353. See, also, Penobscot Boom Corp. *v.* Lamson, 4 Shep. (Me.) 224. The Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543.

[3] 1 Dill. on Corp., § 55. A corporation has no power except what is given by its incorporating act, either expressly or as incidental to the exercise of the corporate powers granted. Head *v.* Providence Ins. Co., 2 Cranch, 127; Dartmouth College *v.* Woodward, 4 Wheat. 636; Beaty *v.* Knowler, 4 Pet. 152; Smith *v.* Eureka Flour Mills, 6 Cal. 1; Winter *v.* Muscogee R. Co., 11 Ga. 438; Louisiana State Bank *v.* Orleans Nev. Co., 3 La. Ann. 294; Baltimore *v.* Baltimore, etc., R. Co., 21 Md. 50; Whitman Mining Co. *v.* Baker, 3 Nev. 386; Downing *v.* Mt. Washington R. Co., 40 N. H. 230; Strauss *v.* Eagle Ins. Co., 5 Ohio St. 59; White's Bank *v.* Toledo Ins. Co., 12 id. 601; Madison, etc., R. Co. *v.* Watertown, etc., P. R. Co., 5 Wis. 173; Middle Bridge *v.* Brooks, 13 Me. 391; Merriam *v.* Moody's Executors, 25 Ia. 163; Nicholson Pavement Co. *v.* Painter, 35 Cal. 699.

may not be reasonably inferred. But if we were to say that they can do nothing, for which a warrant could not be found in the language of their charters, we should deny them in some cases the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And, therefore, it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation, which are reasonable and proper to give effect to the powers expressly granted. In doing this, they must have a choice of means adapted to ends, and are not confined to any one mode of operation."[1] But the powers must be germaine to the purposes of its creation;[2] and in construing grants, the settled rule of the courts is, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, the objects of the grant being considered in construing it. But any doubts arising in the construction of public grants are in favor of the public.[3]

SEC. 54. **The corporate powers limited to the objects of the grant.** — In construing corporate grants, it is uniformly held, that the corporate powers are restricted by the nature and objects of the institution, and will not in this respect extend beyond the letter or spirit of the grant or statute. They can lawfully exercise no powers except such as are expressly conferred, or such as are necessary to the performance of corporate duties, in the accomplishment of the purposes and objects for which the body was incorporated. An attempt to exercise powers beyond this would be ultra vires and void.

"This principle," observes Chief-Justice SHAW, "is derived from the nature of corporations, the mode in which they are

[1] Bridgeport v. Railroad Co., 15 Conn. 475.

[2] Mayor v. Yuille, 3 Ala. 137; Harris v. Intendant, 28 id. 577; Intendant v. Chandler, 6 id. 899.

[3] Minturn v. Larue, 23 How. (U. S.) 435. The supreme court of Pennsylvania say: "When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. * * * In the construction of a charter to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation." Pennsylvania R. Co. v. Canal Coms., 21 Pa. St. 22.

organized, and in which their affairs must be conducted. In aggregate corporations, as a general rule, the act and will of the majority is deemed in law the act and will of the whole — as the act of the corporate body. The consequence is, that a minority must be bound not only without but against their consent. Such an obligation may extend to every onerous duty, to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is a steady adherence to the principle stated, viz., that corporations can only exercise powers over their respective members, for the accomplishment of limited and defined objects. And if this principle is important, as a general rule of social right and municipal law, it is of the highest importance in those states where corporations have been extended and multiplied, so as to embrace almost every object of human concern." [1]

According to the principles of the law relating to the powers of corporations, it is evident that if a corporation is instituted for purposes of insurance, it could not properly engage in banking, but must be confined to the business for which it was incorporated; and it has been held that notes discounted, and securities for money loaned by an insurance company, in violation of statutes restraining such action, were void.[2]

The same doctrine was held in a case where a library association attempted to exercise the business of banking.[3]

We shall hereafter consider the powers of corporations in connection with corporate meetings, and the management of corporate business; the power to sue and be sued, to use a corporate seal, to contract, and to make by-laws.

[1] Spaulding v. Lowell, 23 Pick. 71. See, also, Stetson v. Kempton, 13 Mass. 272; Willard v. Newburyport, 12 Pick. 227; Keyes v. Westford, 17 id. 273; Cooley v. Granville, 10 Cush. 57. And the law creating a corporation will be an index to the objects for which it was created and the powers with which it was endowed. Aurora v. West, 9 Ind. 74.

[2] Utica Ins. Co. v. Scott, 19 Johns. 1.

[3] State of Ohio v. Washington Library Co., 11 Ohio, 96. See, also, Lessees of Knowles v. Beatty, McLean (C. C.), 43; People v. Utica Ins. Co., 15 Johns. 358; Korn v. Mutual Ins. Soc., 6 Cranch, 192; New York Fire Ins. Co. v. Ely, 5 Conn. 560; Bank of Utica v. Smedes, 6 Cow. 662; Perrine v. Chesapeake, etc., Canal Co., 9 How. (U. S.) 172; Trustees v. Peaslee, 15 N. H. 317.

SEC. 55. **Distinction between corporate and copartnership associations.** — There are some points of resemblance as well as marked differences between corporate and mere partnership associations, which it may be well here to notice. The leading principles of the common law relating to both corporations and partnerships are borrowed from the Roman law. This is the inexhaustible fountain of various and valuable learning — the concentrated wisdom of eminent jurists, adapted to the convenience, the wants and the policy of a commercial people in all ages.[1]

The points of resemblance which may be noticed are: (1) each may be composed of many members associated together for some specific object; (2) the members may consist not only of natural persons, but of other corporations or partnerships; (3) the capital of each may consist of a joint stock, which may be divided under by-laws or fundamental articles of agreement into shares, and transferred by assignment or delivery; (4) each may have a common name; (5) the liability of partners, like that of corporators, is frequently, as we have observed, limited by statute to a certain amount, as the amount of the stock subscribed or owned by them; (6) each usually acts by its agents, and may sue and be sued by the corporate or partnership name. On the other hand, there are, at least at common law, some marked distinctions between them. The members of a partnership are each agents for the partnership, and by their simple act may bind the firm, as any other agent may, within the scope of his authority, bind his principal. Each member is personally liable to the creditors of the firm. But as a general rule corporators are not personally liable to the creditors of the corporation, although they may be required to fulfill their obligations to it.[2] Nor is there any general authority for corporators to act as agents for the corporation.[3] In the case of partnerships each partner is the accredited agent of the other, and may bind them as such agent to the extent of their

[1] Story on Part., ch. 1; 2 Kent's Com., § 33, p. 269; 1 Brown's Civ. and Adm. L. 142; Wood's Ins. Civ. L. 134.

[2] The stockholders of a company incorporated under general laws are not partners even between themselves. Baker v. Backus, 32 Ill. 79. And where the statute contains no provision making the corporators individually liable, they are not so liable. Shaw v. Boylan, 16 Ind. 384. And such liability cannot be imposed by a by-law. Trustees, etc., v. Flint, 3 Metc. 539; Hopkins v. Whitesides, 1 Head, 31; Coburn v. Wheelock, 34 N. Y. 440.

[3] Ruby v. Portland, 15 Me. 306.

property, but the personal responsibility of stockholders is inconsistent with a body corporate at common law.[1]

[1] "When two or more persons desire to unite their means for the purpose of carrying on some enterprise or business which neither might be able to accomplish by himself alone, there are but two ways of doing it conveniently. The persons in question must be constituted a corporation by means of a legislative act or charter, or they must enter into a partnership by virtue of a contract. In either case their relations will be determined, partly by the express provisions of the charter or contract, and partly by the implied conditions tacitly annexed by law to each of these relations. Thus, while corporations and partnerships both agree in being relations voluntarily assumed by the members, and also in having for their object the association of several individuals for the purpose of co-operation in business, yet they differ so materially in their mode of creation, and in many other respects, that they require a separate consideration." Walker on Am. Law, p. 223.

CHAPTER IV.

PERPETUAL SUCCESSION.

SEC. 57. **The doctrine of immortality.** — The incident or capacity of perpetual succession is among the most important connected with private corporations. This is sometimes expressed by the term immortality, which, however, is not strictly correct, as applicable to corporations, as perpetual succession only means that they may continue, and rights and interests therein be transferred in succession, for an indefinite time, or so long as the corporation may legally exist. But private corporations in this country are usually limited as to the period of their continuance by the statutes under which they are constituted, and they may also be terminated for various causes, before the period thus limited. They may, for instance, be dissolved for the want of members, for nonuser, or for misuser of their franchises.[1] We shall consider the subject of their dissolution hereafter.[2]

By virtue of this capacity of succession a corporation continues the same legal person and identity, from the time of its creation until the time of its dissolution, notwithstanding changes in its members by death or otherwise, "so that it is unnecessary to make grants to them and their successors, or to declare their obligations binding on their successors."[3]

SEC. 58. **The advantages of perpetual succession.** — Perpetual succession, as we have seen, is that continuous existence which enables a corporation to manage its affairs and hold property, without the

[1] Dill. on Corp., ch. vii; Ang. & Am. on Corp., ch. xxii, and authorities cited; 2 Kyd on Corp. 445 *et seq.*; Wilcock on Corp. 326 *et seq.*; 1 Bl. Com. 485; 2 Kent's Com. 305; Boston Glass Man. *v.* Langdon, 24 Pick. 52; McIntyre Poor School *v.* Zanesville Canal Co., 11 Ohio, 203. So they may surrender their franchises. People *v.* President, etc., of California College, 38 Cal. 166.

[2] See *post*, ch. 13 and 20.

[3] 1 Wilc. on Corp. 16.

necessity of perpetual conveyances for the purpose of transmitting it. By reason of this quality this ideal and artificial person remains, in its legal identity and personality, the same, though frequent changes may be made of its members; and although all of its members may be changed and new ones substituted for the old, it still legally remains one person. In reference to the advantages thus possessed by a corporation, Blackstone observes: "To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study and perform scholastic exercises together, so long as they could agree to do so; but they could neither frame nor receive any laws or rules of their conduct, none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities, for if such privileges be attacked, which of all this uncontrolled assembly has the ability to defend them? And when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students equally unconnected as themselves? So also with regard to holding estates or other property, if land be granted for purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes but by endless conveyances from one to the other as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are considered as one person in law. As one person they have one will, which is collected from the sense of the majority of the individuals. This one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws for this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws. The privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be forever vested, without any new conveyance to new successions, for all the individual members that have existed from the foundation to the

present time, or that shall ever hereafter exist, are but one person in law, a person that never dies, in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant."[1]

SEC. 59. The members of the corporation may change, but it remains the same legal person, whether the corporation is public or private. It continues the same body politic from its creation to its dissolution, unaltered by the revolutions of ages or the successive changes of its members; therefore it is unnecessary to make grants to it and its successors, or to declare its obligations binding on its successors.[2] If a conveyance of land is made to an association of individuals not incorporated, their successors could not enjoy the land without a conveyance from each of the members composing it, and if numerous changes should be made in the members of the association, as many conveyances would be required. On the other hand, if the persons were incorporated so that in law they would constitute but one person, a conveyance of land to them in their corporate capacity and name would vest the title in the corporation, and it could thus be enjoyed by it so long as it had a legal being, or until it should make a conveyance of the same in its corporate name.

The advantages of this perpetual continuance and succession in the various undertakings of mankind at the present day will be manifest. In enterprises of great magnitude, where the associated wealth of many persons may be required, it enables the persons thus associated as one body to apply the capital thus pledged to the objects of the association; to hold real or personal property, and convey the same without the inconvenience of frequent conveyances by each member, or of perpetual conveyances, at each change of membership; "and its youth and vigor are perpetuated by a succession of fresh managers, while its finances can neither become legally diverted from its business, nor be withdrawn by personal gratification or necessity."[3]

[1] 1 Bl. Com. 467, 468.

[2] Wilc. on Corp. 16; Grant on Corp. 5; Glover on Corp. 8; 7 Vin. Abr. 358; 1 Bl. Com. 468.

[3] Ang. & Am. on Corp., §§ 12, 146; Dartmouth College *v.* Woodward, 4 Wheat. 636; *ante*, § 1. In Dartmouth College *v.* Woodward, *supra*, Chief-Justice MARSHALL, in relation to the properties of corporations, observes: "Among the most important are immortality, properties by which a per-

SEC. 60. This right of perpetual succession is incident to every corporation; and they may take, hold and transmit real or personal property, limited in that respect only, by the constitution or the act creating it. We shall hereafter more fully consider the power to acquire and hold property and the limitations on this power.

petual succession of persons are considered the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacy, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one *immortal* being."

CHAPTER V.

MEMBERS. STOCKHOLDERS AND STOCK.

SEC. 61. **Composition of private corporations.** — We have stated that a corporation is an association of persons constituting in law one artificial person, endowed with certain capacities and incidents; and that the component parts or corporators need not necessarily be natural persons.

On the contrary, this incorporeal, imaginary and artificial person may be composed of other artificial persons or corporations, or of copartnerships, as well as natural persons;[1] and they may consist of women and children as well as adult persons.[2]

SEC. 62. **The government may constitute a member.** — In the case of the original United States Bank, incorporated in 1791, the government became one of its members by subscription to its stock to the amount of one-fifth thereof.[3]

This institution was not merely a commercial institution, but was mainly and essentially of a financial and political character; and like the banks of England, Venice and Genoa, as we have heretofore noticed,[4] it was chartered mainly for governmental purposes; and the United States became a member by subscribing to its stock through its authorized agent.[5] So, in case of the Planters' Bank of Georgia, and the State Bank of South Carolina. Although these banks were chartered by the states of Georgia and South Carolina, respectively, the states creating them became

[1] Kyd on Corp. 32; Bank of U. S. *v.* Planters' Bank of Ga., 9 Wheat. 907; Ang. & Am. on Corp., § 95.

[2] Ayliffe's Civ. L. 204; 1 Kyd on Corp. 32; 10 Co. R. 31 b.

[3] Hildreth on Banks and Banking, 59 *et seq.*

[4] See *ante*, § 6.

[5] Hildreth on Banks and Banking, 58; Ency. Am., vol. 1, p. 548; Bank of U. S. *v.* Planters' Bank of Georgia, 9 Wheat. 907.

members thereof.[1] Several corporations may form a component part of one corporation.[2]

And the mayor or aldermen and commonalty may constitute a corporation; but in such a case "neither of them has any corporate capacity distinct from the other two, and, therefore, the mayor cannot in his political character of mayor take in succession any thing as a sole corporation; nor can the aldermen as a select body take any thing to them and their successors as an aggregate corporation."[3]

There are various corporations in England, especially political or municipal, that are constituted of integral parts, without which parts the corporation would not be complete; nor has any of the integral parts power to act without the others.[4] Such is the mayor, aldermen and commonalty; they constitute three distinct parts.[5]

Under the former railroad system of England, the corporate organs of railroad corporations were three-fold, viz.: The general assembly of the company, the board of directors, and a duly constituted agent.[6] But in this country, especially private corporations for the pecuniary emolument of its members, are constituted on the unitary principle, and usually in all matters relating to the objects for which the corporation is instituted, the constating instruments confer on a limited number of directors the management of its affairs. In the absence of such an arrangement the members of it constitute the corporate body, and there are usually at least no separate or constituent parts. Membership is usually provided for by the general law under which it is instituted or by the articles or certificate of association, signed and filed for record by the original corporators in some public office or offices designated by the general law under which it is organized and constituted.

SEC. 63. **Admission and election of members and officers.** — The rules and doctrines of the common law in relation to the admission and election of members and officers in corporations of a religious or literary character, has generally no application in this country to

[1] State Bank S. C. v. Gibbs, 3 McCord, 377; State Bank of N. C. v. Clark *et al.*, 1 Hawks (N. C.), 36.

[2] Kyd on Corp. 36.

[3] 1 Kyd on Corp. 36; Ang. & Am. on Corp., § 97.

[4] Id.

[5] Id.

[6] Wolf. on Railways, 70; see *ante*, ch. 2.

corporations instituted under general statutes for pecuniary profit. The number of the members under the former class is frequently limited by the charter, and when a vacancy occurs provision is usually made for filling it by an election of some person by the remaining corporators.

But, in ordinary private statutory corporations, the joint stock, or capital, is divided into equal shares, and membership consists of the ownership of shares, either by original subscription and ownership, or by subsequent purchase of shares of the same.[1]

SEC. 64. **Disfranchisement or expulsion of members.**—The right to deprive a member of a corporation of his rights as such by expulsion depends upon the nature and character of the corporation, the provisions of the charter or act, and sometimes on the provisions of the by-laws.

This right has no general application to ordinary statutory corporations created for pecuniary gain, with a joint stock, or capital divided into shares. In such a case, as we have noticed, ownership of shares constitutes membership; and the stockholders are secured all the rights of members so long as they continue to own shares of stock. They may become such by purchase, and cease to be such when they transfer their stock certificates.

The character or conduct of a stockholder could not be made the legal ground of removal, nor can the company divest him of his interest without his assent.[2]

But such power could, undoubtedly, be expressly conferred by the special act or by general acts of incorporation, or by virtue of the paramount authority of the legislature; and is, in fact, thus conferred, or by the articles of association, whenever the company or its directors, who represent it, are authorized to forfeit stock for the non-payment of dues;[3] in which case the rights of the owner ceases on the forfeiture being legally declared.

[1] Gilbert *v.* Manchester Iron Co., 11 Wend. 627; Sargent *v.* Franklin Ins. Co., 8 Pick. 90; Downing *v.* Potts, 3 Zabr. 66; Green's Brice's Ultra Vires, 45–47.

[2] 2 Kent's Com. 298; Green's Brice's Ultra Vires, 45–47.

[3] Evans *v.* Philadelphia Club, 50 Pa. St. 107; Society *v.* Commonwealth, 52 id. 125; Leech *v.* Harris, 2 Brewst. 571. See, also, Waterbury *v.* Express Co., 3 Abb. (N. S.) 163; State *v.* Justinian Soc., 15 La. Ann. 73. On this subject it is observed by Angel & Ames, in their Treatise on Corporations, as follows: "With regard to

The power to remove, however, otherwise than above stated, is seldom conferred by law, either upon the corporation or the board of directors of a joint-stock corporation, constituted purely for pecuniary profit.

SEC. 65. There is a class of *quasi* private corporations instituted for private purposes, though not for direct pecuniary profits, where the aim and object of the corporators and the provisions of the charter or by-laws, may warrant and authorize the expulsion of members. And, where a charter of a society directed the mode of proceeding against a member charged with an offense indicated by it, and authorized the society to expel a member guilty of it, it was held that such a person might be lawfully expelled, and that, if the proceedings were regular, the action of the corporation in this respect could not be inquired into collaterally in a proceeding by mandamus, or in any other manner in the courts.[1]

And where a by-law of a chamber of commerce, provided for the expulsion of members for the violation of it, it was held to be reasonable and valid and enforceable, even though the contract made in violation of its provisions was void by the statute of frauds, and although it was not made during the session of change of the chamber of commerce[2] And where the charter stated

what are called joint-stock incorporated companies, or, indeed, any corporation owning property, it cannot be pretended that a member can be expelled, and thus deprived of his interest in the stock or general fund in any case by a majority of the corporators, unless such power has been expressly conferred by the charter. And if an owner of stock could be excluded, without any provision in the charter, from participating in the election of officers, and in the other affairs of the company, he would still be entitled to the amount of his stock, and could recover it in an action against the corporation." Ang. & Am. on Corp., § 410. See, also, Evans *v.* Phil. Club, 50 Pa St. 107; Society *v.* Commonwealth, 52 id. 125; Hopkins *v.* Exeter, L. R., 5 Eq. 63; Roehler *v.* Mechanics' Aid Soc., 22 Mich. 86; Davis *v.* Bank of Eng., 2 Bing. 393; State *v.* Tudor, 5 Day, 329; Delacy *v.* Neuse Riv. Nav. Co., 1 Hawk. 274; Ebaugh *v.* Hendel, 5 Watts, 43.

[1] Leech *v.* Harris, 2 Brewst. (Pa.) 571.

[2] Dickenson *v.* Chamber of Commerce, 29 Wis. 45.

In this case the by-law under which the proceedings were taken provided: "It shall be the duty of the board of directors to examine charges of misconduct in business matters, preferred against any member of the association, when made to the president or secretary in writing, by a member of the association, and if the party shall be found guilty of a violation of the rules, of failing to promptly comply with the terms of any contract either verbal or written, or of making false or fictitious reports

that the corporation was instituted, among other things, to inculcate just and equitable principles in trade, it was held, that a member might be expelled for obtaining goods under false pretenses, though the offense was not committed within the local jurisdiction of the corporation nor against a member thereof. And where a member of such a corporation performs an act in direct contravention of the purposes for which it is instituted, it has been held that it possesses the power to expel such member.[1]

of sales or purchases, or of any other act contrary to the spirit which should govern all commercial transactions, they shall report the same to the association, either at a regular annual meeting or at a meeting called for that purpose; and the member shall be suspended or expelled, if so determined by a majority of the members present and voting, the number not being less than one hundred. * * * No member shall be suspended or expelled without having an opportunity of being heard in his own defense, and any member having been expelled, shall be ineligible to membership until the association see proper to remove his disability."

The bill of the plaintiff was for an injunction, for the purpose of restraining the defendant from interfering with his rights and privileges as a member of the association, and from suspending or expelling him from the privileges thereof; and it averred in substance the intention of the defendant so to do on the ground of the plaintiff's failure to keep and perform two verbal contracts for the sale of wheat; that they were void by the statute of frauds; that the contracts were not made during any session of change of the chamber of commerce; that the contracts did not in any way relate to the affairs or business of the corporation; that the contracts were made after the hours of change, and in the offices of the other parties to the contract. The court below refused, on motion, to dissolve the injunction. On appeal, COLE, J., observed: "If it was one of the objects of the association 'to inculcate just and equitable principles of, in trade,' it is apparent would be better attained by raising the standard of morality among its members, in requiring them to perform all their business engagements, whether legally binding upon them or not. Consequently, we can see no valid objection to the by-law which provides that if a member shall be found guilty of a failure to comply promptly with the terms of any contract, either verbal or written, it should constitute a good ground for the suspension or expulsion of such member from the privileges and benefits of the corporation. There is surely nothing unreasonable or unjust, nothing illegal or wrong, in such a by-law. Nor do we think there is any ground for saying that this by-law only had reference to such contracts as were made during a session of change of the chamber of commerce, and made upon the floor of the chamber of the corporation. It applied to all his business conduct and relations with the members of the association at least. And the plaintiff, after having voluntarily connected himself with the association, is bound to observe the rules and regulations adopted by it to secure the objects of its creation."

[1] People *v.* New York Loan Commercial, 18 Abb. Pr. 271. See, also, People *ex rel.* Page *v.* The Board of Trade of Chicago, 45 Ill. 112.

In Dickinson *v.* Chamber of Commerce, *supra*, it was further held, that a member might be expelled for the following causes, and that the power in this respect expressed in the charter, was inherent in the corporation:

1. Where an offense is committed which has no immediate relation to a

But, in Pennsylvania, a member of such a corporation cannot be expelled for the non-payment of dues.[1] And even where the right to expel for just cause exists, it cannot generally be exercised in an arbitrary and summary manner, but the party charged with the violation of duty under the charter or by-laws of the association should have an opportunity to be heard in answer to the charges.[2]

SEC. 66. **Membership under general statutes.** — Where a corporation is instituted under general statutes, they and the articles authorized by them, furnish the measure and limitations of the general powers and privileges of the corporators, and they generally provide as to membership and the rights and privileges of members. These instruments become the supreme law of the corporation, limited and controlled only by the constitution of the state creating it, or the constitution of the federal government.

What constitutes membership usually depends upon the nature of the corporation, the provisions of the general law, the articles or certificate of original association, or the rules or by-laws adopted

member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men, and where no trial and conviction before a court is necessary, previous to the act of expulsion by the corporation.

2. Where the offense is against his duty, as corporator, he may be expelled on trial and conviction by the corporation.

3. When the offense is of a mixed nature against the member's duty as a corporator, and also indictable by the law of the land.

Where a medical society provided in their by-laws for the expulsion of members, it was held that it was not vested with arbitrary power or uncontrolled discretion in the matter; and that the courts might investigate the legality of the action of the corporate body taken under it.

The State *v.* Georgia Med. Soc., 38 Ga. 608 (1869).

[1] Diligent Fire Ins. Co. *v.* Commonwealth, 75 Pa. St. 291.

[2] Southern Plank Road Co. *v.* Hixon, 5 Ind. 165; People *v.* San Francisco Benevolent Soc., 24 How. (N. Y.) 216; Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. C.), 274; Bartlett *v.* Med. Soc., 32 N. Y. 187; People *v.* Sailors' Snug Harbor, 5 Abb. (N. Y.) Pr. (N. S.) 119.

And when the articles of a corporation authorized expulsion for scandalous and improper proceedings which might injure the reputation of the society, a member may be expelled for altering the amount of a physician's bill from $4 to $40; and for presenting the bill to the president as the basis of a claim. Commonwealth *v.* Philanthropic Soc., 5 Binn. (Pa.) 486. See, also, Black & White Smith's Soc. *v.* Van Dyke, 2 Whart. (Pa.) 309; Commonwealth *v.* Pike Beneficial Soc., 8 W. & S. 247; Same *v.* German Soc., 15 Pa. St. 251; Washington Beneficial Soc. *v.* Bacher, 20 id. 425; Butchers' Beneficial Assoc., 38 id. 298; Society for Visitation of the Sick *v.* Commonwealth, 52 id. 125.

by the corporators, not inconsistent with the general or fundamental law.

The parties subscribing articles of association may adopt by-laws, providing for and regulating membership; and if such authority is not expressly given, it would be among the implied and inherent powers of a corporation.

The statutes or regulations of private corporations, for pecuniary gain, usually provide for the amount of the capital stock of the corporation, and for its division into equal shares of a certain amount, and that stockholders are members and entitled to a voice or vote in the management of the corporate affairs.[1]

SEC. 67. **Management by directors.** — The rights and privileges of members are frequently left to be provided for by the by-laws, which may be adopted by the corporators.

By virtue, also, of such statutes, articles or by-laws, the management of the business of the corporation may be vested in a limited number of the members, or in a board of directors, who are appointed by the members at some general meeting called for that purpose. By such means, the authority to manage the affairs of the corporation which, on general principles, would rest in the members, is conferred upon a board of directors thus appointed, whose action, however, is by virtue of the election or appointment authorized by the corporators, and is the action of the corporation, binding the same in every respect as though it were done by all its members, lawfully assembled and acting for the corporate body.

Whether the business is managed by the corporators directly, or indirectly, by a board of managers or directors, the management is considered to be in accordance with the will of the majority of the members or stockholders; and that will must be expressed in either case by a majority of either, at a lawful meeting, unless it is otherwise provided in the law constituting it, or by by-laws lawfully adopted.

[1] "In all bridge, railroad and turnpike companies, in all bank, insurance and manufacturing companies, and, generally, in corporations having a capital stock and looking to profits, membership is constituted by a transfer of shares according to the by-laws, without any election on the part of the corporation itself." Opinion of SHAW, C. J., in Overseers, etc., v. Sears, 22 Pick. 122.

SEC. 68. As it is usually quite impracticable for the members of a corporation to meet and express its will by a majority of its members or stockholders, the convenience, if not the necessity, of having a small body of such members, to represent and act for them, will be apparent.

The wisdom of such an arrangement cannot be questioned. For the various matters that must arise in the extensive operations of many of our private corporations would render it almost impossible practically to conduct its affairs, unless the general management was confided to a limited number.

The members or stockholders are usually difficult to be found, and it would be more difficult to convene them for corporate business, on all the various questions that would usually arise, calling for corporate action.

SEC. 69. **Shareholders are members, right to vote.** — As the power to appoint directors would, on general principles of the law, even in the absence of special regulations, vest in the members, and as membership consists usually in ownership of shares,[1] and the right to and ownership of such shares, is evidenced by certificates of stock duly prepared and authenticated by the proper agents, and as such certificates may be held by the original owners or transferred to other parties by assignment, and the assignees thereby become stockholders and members of the same, and entitled to a voice or vote for each share so held by them, at all general corporate meetings, it becomes necessary for the adoption of some rule or by-law, providing for such transfer of the certificates of such stock, and for some record of the same on proper books of the corporation kept for such purpose. It is usual, therefore, to provide, either by the articles or the by-laws, that suitable books shall be kept for the registry and transfer of the capital stock of the company, and that every transfer of such stock to be valid shall be made upon such books, and signed by the assignor of such shares, or by his agent, duly constituted in writing.[2] It is possible

[1] Schaeffer v. Missouri, etc., Ins. Co., 46 Mo. 248.

[2] For forms with the usual provisions in the articles of association and by-laws of corporations, instituted under general statutes, see Appendix. The certificates of shares are usually signed by the president or vice-president, and countersigned by the secretary of the company. See, also, Union Bank v. Laird, 2 Wheat. 390; Black v. Zacharie, 3 How. 513; Fisher v. Essex

that, under the general provisions of statutes, the powers and franchises, as well as the capital stock, may be possessed and owned by one person constituting it, in one sense, a sole corporation, but with the powers and privileges of an aggregate one.

In fact, it is expressly provided by the statutes of some of the states, that the rights and powers conferred by the incorporating statutes may be enjoyed by a single person, who may, by complying with the provisions of the statutes so far as the same can be applicable to the incorporation of a single person, become thereby incorporated.[1]

SEC. 70. The provision for the transfer of stock on the books of the corporation is necessary in order that the officers or agents of the corporation may know on whom to serve notices of the general meetings, and to secure the members against fraud, which otherwise might be perpetrated upon them. For, as we shall have occasion hereafter to notice more fully, the members are generally entitled to notice of corporate meetings, and to vote at such meetings the number of votes, which the stock they may own may entitle them to, and a majority of such votes may control the action and the policy of the corporate body, either directly by the stockholders or indirectly by the duly constituted board of directors.[2] The power of expulsion of the members of such a

Bank, 5 Gray, 373; Chouteau Spring Co. v. Harris, 20 Mo. 382; Grant v. Mechanics' Bank, 15 S. & R. 143; Duke v. Cahaba Nav. Co., 14 Ala. 82; Arnold v. Suffolk Bank, 27 Barb. 424; Bank of Utica v. Smalley, 2 Cow. 770; Gilbert v. Manchester Manuf. Co., 11 Wend. 627; Sargent v. Franklin Ins. Co., 8 Pick. 90.

[1] See Code Iowa, § 1088, which provides as follows: "A single individual may entitle himself to all the advantages of this chapter (relating to incorporations for pecuniary profit) provided he complies substantially with all its requirements, omitting those which from the nature of the case are inapplicable."

[2] In Massachusetts, it appears that it is not necessary, in order to constitute a person a member of a corporation for manufacturing purposes, that he should have a certificate of his shares. Chester Glass Co. v. Dewey, 16 Mass. 94.

But where the statute requires every subscriber to pay a certain sum of money to become a member, the mere subscription to stock of the company, without payment of the sum required, does not constitute the party subscribing a member on his subscription. Highland Turnp. Co. v. McKean, 11 Johns. 98; Hibernia Turnp. Co. v. Henderson, 8 S. & R. 219; S. C., 13 id. 434.

In case of a dispute as to the right to vote at a corporate meeting, the books of the corporation are *prima facie* evidence as to who possess that right. Hoppin v. Buffum, 9 R. I. 513.

A combination between a portion of the members of a mining corporation to secure a board of directors and the management of the property was held not to be void as against the public policy. Faulds v. Yates, 57 Ill. 416.

corporate body must rest upon some express provision in the organic law of the corporation or to be plainly inferred from the nature and purpose of the incorporation.

We have said that ownership of stock usually constitutes membership and entitles the owner to vote at all corporate meetings.[1]

And it has been held, that when a holder of a certificate of corporate stock really holds it for another, but such trust does not appear on the books of the company, and it is not disclosed by the trustee, votes of such trustee on such stock at a corporate meeting are valid; and that especially would this be the case where it did not appear that the votes thus cast were not in accordance with the wishes of the *cestui que trust*, or that the latter was not satisfied that the stock should thus stand in the name of the person thus voting.[2] The question as to the right to vote at such meetings is usually determined by reference to the books of the company which, under the regulations in reference to the issue and transfer of stock, should show the party who owns the same; and they are usually at least *prima facie* evidence as to who is possessed of the right to vote on shares.[3]

SEC. 71. Upon the death of a stockholder, in a corporation, intestate, and the appointment of an executor or administrator of his estate who accepts the trust, he becomes, by operation of law, vested with the legal title to the stock, and with all the rights appertaining to the ownership of the same, and especially the right of voting at elections of directors of the company, without any formal transfer of the stock on the books of the company being necessary for that purpose.[4]

But it is evident that the corporation in such cases might properly require evidence of the decease of the owner, and of the due appointment of such executor or administrator, who should

[1] A subscriber who has paid part of his subscription but whose stock is afterward forfeited for the non-payment of calls, is not a stockholder within the meaning of the New York statutes. Mills v. Stewart, 41 N. Y. 384.

[2] Wilson v. Proprietors of Central Bridge, 9 R. I. 590.

[3] Hoppin v. Buffum, 9 R. I. 513.

[4] Matter of North Shore Ferry Co., 63 Barb. 556. And a combination between a portion of the members of a corporation to secure an election of a board of directors and the management of the profits is not void as against public policy. Faulds v. Yates, 57 Ill. 416.

claim the right to vote by virtue of his appointment as the representative of the deceased.

SEC. 72. **Stockholder's right to vote by proxy or attorney.**—There is usually a provision in the articles of association, that the members may be represented in the corporate meetings by an agent or *proxy* duly constituted.

In such cases the personal attendance of the member at a general meeting is unnecessary, but the votes which a principal would be entitled to cast if personally present may be cast by his duly constituted agent. But the right of proxies to vote, as well as the manner of voting in moneyed corporations, is usually provided for by the articles of association, or the by-laws duly adopted in accordance with such articles, they constituting the guide and authority in this matter. When the constating instruments provide for the right of voting by proxy, that settles all questions relating to the subject.[1]

And it is generally so provided, in case of corporations for pecuniary gain. But it was formerly a controverted question whether the corporation could by its by-laws provide for such a method of voting where the constating instruments were silent upon the question. Mr. Kent observes: "Though in case of elections in public and municipal corporations, and in all other elections of a public nature, every vote must be personally given; yet in the case of moneyed corporations, instituted for private purposes, it has been held that the right of voting by proxy might be delegated by the by-laws of the institution, when the charter was silent."[2] But in *Philips* v. *Wickham*,[3] the chancellor doubted the validity of the right of voting by proxy, when the right is not given either expressly or impliedly in the act creating the institution; and subsequently, after a full consideration of the question by the supreme court of New Jersey, it was held to be a principle of the common law, that where an election depended upon the exercise of judgment, the right could not be deputed; and that it required legislative sanction before any corporation

[1] The right to vote at corporate meetings on shares of the stock of the corporation held in trust for the benefit of the corporation is suspended while they are so held. American Railway Frog Co. *v.* Haven, 101 Mass. 398.

[2] 2 Kent's Com. 294; State *v.* Tudor, 5 Day, 329.

[3] 1 Paige, 593.

could make a valid by-law authorizing members to vote by proxy.[1]

But we will consider this subject more fully when we come to treat of corporate meetings.[2]

SEC. 73. **Matters stockholders are presumed to know.** — It is a general rule that a person who becomes a member of a corporation is presumed to know the obligations he assumes under the charter and the by-laws of the body. And if he or the corporation is mistaken in their construction of them, this would not be the ground for setting aside a contract between them.[3] And it has been held that parties assuming to act in a corporate capacity, and as members of a corporation which has in fact no corporate existence, are personally liable to those with whom they contract as partners; but it must appear that they were so acting at the time the contract was made.[4]

SEC. 74. **Personal liability of stockholders under statutes.** — The stockholders of a corporation are frequently made individually responsible for the debts and liabilities of the corporation, or to a limited amount or proportion of the same, by the express provisions of the incorporating statutes, or the constitution of the state. These provisions vary the general common-law rule, exempting the members from individual liability beyond their express obligations to the company. The statute of California concerning mining corporations provides that "each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted." [5]

[1] Taylor *v.* Griswold, 2 Green (N. J.), 223.

[2] See *post*, ch. 8.

[3] Chesapeake, etc., Canal Co. *v.* Dulany, 4 Cranch (C. C.), 85; Palmyra *v.* Morton, 25 Mo. 593.

A corporation may contract with a corporator, and sue or be sued on the contract. Culbertson *v.* Wabash Nav. Co., 4 McLean, 544. But a corporation is not generally bound by the admission of its members, unless acting by its express authority. Shay *v.* Tuolumne Co. Water Co., 6 Cal. 73.

Subscribers for stock in a railway company must be presumed to know the provisions of the charter of the company. Wight *v.* Shelby, etc., R. Co., 16 B. Monr. 4.

[4] Fuller *v.* Rowe, 57 N. Y. 23.

[5] Act passed April 17, 1853, amended 1863.

And the constitution of that state provides that "dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law,"[1] and that "each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities."[2] In a suit against stockholders of a mining company in California to recover against them personally a debt due from the corporation, the question was presented whether the stockholders were personally liable beyond their proportion of all the debts and liabilities of the corporation, contracted or incurred during the time they were stockholders, and whether the statutory provision was not void as in conflict with the constitution.

SAWYER, C. J., in delivering the opinion of the supreme court in the case, observed: "It was manifestly contemplated that the legislature should regulate the liability and prescribe the rule by which each stockholder's proportion should be ascertained. The principle adopted by the legislature makes every stockholder liable for his share of all debts contracted while he is a stockholder. The entire body of stockholders for the time being is personally liable for the entire debt contracted; an entire set of stockholders is liable for every debt. This is sufficient to answer all the requirements of the constitution. There is nothing in the provision that requires each man when he becomes a stockholder to do so on the penalty of becoming responsible for all prior liabilities of the corporation that remain uncanceled. This would be to make several different sets of stockholders personally responsible for some debts and only one set for others. There is nothing in the constitution requiring such a result."[3] In an action against a stockholder under the provision of the foregoing statute, to recover a proportional share of one of the corporate debts, the evidence must show that he was a stockholder at the time the debt was contracted; and where a judgment against the corporation does not show when the debt upon which it was rendered was contracted, it would not be sufficient to establish the liability of a stockholder thereon, nor would a judgment against the corpora-

[1] Art. 4, § 32.
[2] Id., § 36.
[3] Larrabee v. Baldwin, 35 Cal. 155. See, also, French v. Teschemaker, 24 id. 539.

tion, while a party is a stockholder, upon a contract entered into before that time, constitute a contract within the meaning of the act which provides that a stockholder shall be liable for corporate debts contracted or liabilities incurred while he was a holder of stock, so as to render him personally liable for any portion thereof; but in case of liability, a joint and several action may be maintained against the stockholders for a corporate debt.[1]

SEC. 75. Under the foregoing statute, when does a cause of action against a corporation accrue against its stockholders upon their individual liability, for debts and liabilities of the corporation contracted or incurred during the time they were stockholders? Does it accrue at the same time it accrues against the corporation, or not until after a judgment has been obtained against the corporation, and the creditor has failed to collect it from the corporation? Or, in other words, is the liability of the stockholder conditional, or unconditional, absolute or contingent, upon the failure or inability of the corporation to pay?

These questions have been settled by the supreme court of the state, in a case involving the construction of the constitutional and statutory provisions referred to, in which Mr. Justice COPE, who delivered the opinion of the court, said: "It would seem from a just and reasonable construction of the constitutional and statutory provisions upon this subject, that an individual corporator in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of principal debtor. His responsibility commences with that of the corporation and continues during the existence of the indebtedness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their only value, should not be impaired by construction. Similar provisions in other states have generally been construed in the same manner. It has been declared that the members of a corporation who are answerable, personally, for the corporate debts and liabilities, stand in the same position in

[1] Id.; **Davidson v. Rankin, 34 Cal. 503 (1868) S. C., 1** With. Corp. Cases 199.

relation to creditors of the corporation as if they were conducting their business as a common partnership." [1]

SEC. 76. Under the statutes of various states it is also provided that any failure to comply with the requirements of the statute or the articles of association in organizing the corporation, or in intentionally deceiving the public as to their means or liabilities, subjects the stockholders, or those in fault in these respects, to a personal liability; and they are made liable for the corporate debts in the former case, and in the latter to such damages as may be sustained thereby. [2] But it is generally provided in such cases that satisfaction must first be sought of the corporation. [3] The liability of corporators for failure to comply with the law in the institution of the corporation, does not generally apply to railroad corporations; the usual limit of liability of members in such corporations, and in some other cases, being the amount of stock held by them. [4]

[1] Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265; Davidson v. Rankin, *supra*. See, also, Moss v. McCullough, 7 Barb. 295; Harger v. McCullough, 2 Den. 119; Marcy v. Clark, 17 Mass. 330; Southmayd v. Russ, 3 Conn. 56; Moss v. Oakley, 2 Hill. 265; Allen v. Sewall, 2 Wend. 327; Corning v. McCullough, 1 Coms. 47; Simonson v. Spencer, 15 Wend. 548; Todhunter v. Walters, 29 Ind. 105, (1868).

[2] Code Iowa, §§ 1068–1071; Corporation Acts of California, 1853-1863: Rev. St. Me., ch. 76.

[3] Id., § 1083. See, also, as to the construction of a former but similar statute of that state, Donworth v. Coolbaugh, 5 Ia. 300; McKellar v. Stout, 14 id. 359.

[4] Iowa Code (1873), § 1068; Md. Act, 1852, ch. 338. The decisions, under the personal liability provisions of the statutes of the various states, are as follows: —

California. Mokelumne, etc., Co. v. Woodbury, 14 Cal. 265; Irvine v. McKeon, 23 id. 472. But such a clause in the constitution may be waived, by a stipulation to that effect in corporate contracts. French v. Teschemaker, 24 id. 518. See, also, as to the effect of a writing signed by the president of a corporation, as evidence, Curtiss v. Murry, 26 id. 633. See, also, as to individual responsibility under a particular provision of the California statute, Davidson v. Rankin, 34 Cal. 503.

Connecticut. Southmayd v. Russ, 3 Conn. 52; Middleton Bank v. Russ, id. 135; Beardsley v. Smith, 16 id. 368.

Georgia. A stockholder subjected to liability may have his remedy. Force v. Dahlonega Tanning, etc., Co., 22 Ga. 86; Conner v. Southern Ex. Co., 37 Ga. 397.

Illinois. Where a stockholder is liable to the amount of his stock, there should be an averment of the amount in the declaration. Sherman v. Smith, 20 Ill. 350. So suit should be brought within one year. Tarbell v. Page, 24 id. 46. See, also, Baker v. Backus, 32 id. 79.

Iowa. Execution should follow the judgment, with a clause that it be levied on the property of the members. Hampson v. Weare, 4 Ia, 13. See, also, Donworth v. Coolbaugh, 5 id. 300; Corse v. Sanford, 14 id. 235. The bank officer, liable individually under the statute, for payment of bills issued, may contract with another

SEC. 77. **General liabilities on subscriptions for stock.** — The charter or act of incorporation, or the general statutes and articles of association, under which a corporation is instituted, is, like the

party for the redemption of them. Allen *v.* Pegram, 16 id. 163.

Kentucky. Greenup *v.* Barbee, 1 Bibb (Ky.), 320. Corporators, only, liable for a note, who were such at the time it was given. Castleman *v.* Holmes, 4 J. J. Marsh. 1. See, also, Roman *v.* Fry, 5 id. 634; De Wolf *v.* Mallett, 3 Dana, 218; U. S. Bank *v.* Dallam, 4 id. 574; Cornwall *v.* Easthman, 2 Bush, 561.

Louisiana. Brown *v.* Union Ins. Co., 3 La. Ann. 177; Roberts *v.* Conrey, 5 id. 297; Stark *v.* Burke, id. 740. One whose stock has been forfeited will not be further personally liable. Macauly *v.* Robinson, 18 id. 619.

Maine. The creditor must, under act of February 16, 1836, first obtain judgment against the corporation. Drinkwater *v.* Portland Marine R., 18 Me. 35.

A statute, making stockholders in a pre-existing corporation liable individually for the debts of the corporation, is constitutional in respect to debts contracted after the passage of the statute. Stanley *v.* Stanley, 26 Me. 191. See, also, Longley *v.* Little, id. 162; Fowler *v.* Robinson, 31 id. 189; Fowler *v.* Ludwig, 34 id. 455; Grose *v.* Hilt, 36 id. 22; Hudson *v.* Carman, 41 id. 84; Cummings *v.* Maxwell, 45 id. 190.

Under the act of 1856 a stockholder cannot be personally liable in an action commenced after the passage of the act, to recover a debt contracted before its enactment. Coffin *v.* Rich, 45 id. 507; Carroll *v.* Hinkley, 46 id. 81; Cathorn *v.* Towle, id. 302; Holt *v.* Blake, 47 id. 62.

Judgment against the corporation is binding upon the stockholders, and, until reversed, is conclusive upon them in a subsequent suit against them by the same plaintiff. Milliken *v.* Whitehouse, 49 Me. 527.

Maryland. Section 9, of chap. 338, of the act of 1852, provides that stockholders "shall be severally and individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all contracts made by such company until the whole amount of capital stock fixed and limited by such company shall have been paid in, one-half thereof in one year, and the other half in two years, from and after the incorporation of said company, or such corporation shall be dissolved."

On a bill filed by creditors, to make certain stockholders liable under this provision, the latter attempted to set off the amount of certain loans made by them to the company. But the supreme court of Maryland held: 1. That though the doctrine of recoupment might arise, it did not follow that the stockholders were absolved from liability to the creditors of the company; 2. That the statute did not refer to them in their corporate capacity, but as individual stockholders; and it declared their liability without reference to the amount they might have paid for the stock; 3. That the stockholders were not liable for debts contracted by the company subsequent to the parting with their stock; 4. That each might insist upon contribution from the others, of their proportion of the complainant's claims. Matthews *v.* Albert, 24 Md. 527.

Massachusetts. Liability several and not joint. Pratt *v.* Bacon, 10 Pick. 127. Law should be construed strictly. 9 Cush. 192. See, also, Holyoke Bank *v.* Burnham, 11 Cush. 183; Handrahan *v.* Cheshire, etc., 4 Allen, 396; Mason *v.* Same, id. 398; Hutchins *v.* New England, etc., Co., id. 580. Under the statutes of 1851, ch. 133, see Bonk *v.* Clark, 6 id. 361; Tyrrell *v.* Washburn, id. 466. Under act, 1862, ch. 218, § 3, see Peele *v.* Phillips, 8 id. 86,

New York. Slee *v.* Bloom, 19 Johns. 456; Briggs *v.* Penniman, 8 Cow. 387; Allens *v.* Sewall, 2 Wend. 327. Stockholder liable though he has paid no part of his subscription. Spear *v.* Crawford, 14 id. 20; Moss *v.* Oakley, 2 Hill, 265.

Debts barred by the statute of limitations cannot be enforced. Van Hook *v.* Whitlock, 3 Paige, 409; Same *v.* Same, 7 id. 373; Corning *v.* McCullough, 1 N. Y. 47; Bogardus *v.* Rosen-

constitution of a state, not only the organic but the supreme law of its being. By some of these constating instruments, the amount of the capital stock is usually fixed, as well as the times and conditions for the payment of subscriptions for the same, the proportion of indebtedness to the capital stock, and, if organized under general statutory provisions, the preliminary steps necessary to incorporate the association.

Provision is also usually made by the articles of association or by-laws, for a division of the capital stock into equal shares, for the issuing of proper certificates therefor to purchasers or subscribers, who thereby become members of the corporation,[1] and for a record of such sales, and of all transfers of the certificates on proper books of the company.

Controversies frequently arise between subscribers and the company as to the liability as well as the rights of the former on their subscriptions. The subscribers for stock are bound to take notice

dale Manuf. Co., 7 id. 147; Moss *v.* Averell, 10 id. 449; Burr *v.* Wilcox, 22 id. 551; Bailey *v.* Hallister, 26 id. 112. The liability of a trustee under the act of 1848 is confined to debts contracted while he was trustee. Shaler, etc., Co. *v.* Bliss, 27 id. 297.

Stockholder liable while he appears upon the books as such, though he has transferred his stock. Worrall *v.* Judson, 5 Barb. 210. See, also, Hoagland *v.* Bell, 36 id. 57; Williamson *v.* Wadsworth, 49 id. 294; Ogden *v.* Rollo, 13 Abb. Pr. 300; Wait *v.* Ferguson, 14 id. 379; Maher *v.* Carman, 38 N. Y. 25; Whitherhead *v.* Allen, 28 Barb. 661; Perkins *v.* Church, 31 id. 84.

The plaintiff must show that the defendant was a stockholder at the time the debt was contracted. Young *v.* N. Y., etc., Steamship Co., 15 Abb. Pr. 69.

North Carolina. Under the provisions of an act of incorporation, providing "that the private property of the individual stockholders shall be liable for the debts of contracts and liabilities of the corporation," it was held that the responsibility of the individual stockholders was secondary, and that when the corporation became extinct the liability of the stockholders became extinct also. Malloy *v.* Mallett, 6 Jones' Eq. 345.

Ohio. Kearney *v.* Battles, 1 Ohio St. 362; Medill *v.* Collier, 16 id. 599.

Pennsylvania. Carr *v.* Le Fevre, 27 Pa. St. 413. A decision in relation to liabilities of stockholders, under the act of 1853. See, also, Patterson *v.* Wyomissing, etc., Co., 40 id. 117. See, also, Wilson *v.* Pittsburgh, etc., Co., 43 id. 424; Mansfield, etc., *v.* Willcox, 52 id. 377.

South Carolina. Where the charter provided, that nothing therein contained should exempt the members "from all liabilities pertaining to general partners," it was held that the members were liable to creditors of the company as partners, and might be sued as such under the corporate name. Planters' Bank *v.* Bivingsville Cotton Man. Co., 10 Rich. 95. See, also, Haslett *v.* Wotherspoon, 1 Strobh. Eq. 209; Farrow *v.* Bivings, 13 Rich. Eq. 25.

Tennessee. Ohio Life Ins. and T. Co. *v.* Merchants' Ins. and T. Co., 11 Humph. 1.

[1] The subscriber to capital stock of an incorporated company becomes a member of it, even though he may subsequently fail to meet calls on his subscription. Schaeffer *v.* Missouri Ins. Co., 46 Mo. 248.

of the requirements of the charter, articles and by-laws of the company, and of the obligations thereby imposed upon them. These usually control the contract and explain the obligation. The subscription becomes a contract between the subscriber and the corporation to pay the sum stipulated, in such manner and on such conditions as may be provided in the express contract, interpreted by the constating instruments, to which he subscribes, or in the absence of this, at such times and on such conditions as may be provided by the articles or by-laws.[1]

SEC. 78. **Conditions provided by the constating instruments.**—Where the charter of a railroad company provided that no subscription should be received and allowed without the payment of five dollars on each of the shares at the time of the subscription, it was held, that a subscription without such payment did not invest the subscriber with any of the privileges of a corporator, nor render him liable either as a subscriber, stockholder, or otherwise.[2] And where, by the incorporating act, the shares of stock were fixed at twenty-five dollars, and it required the payment of ten dollars on each share subscribed at the time of subscribing, it was held in New York, that the subscription and payment were both essential to constitute membership, and to consummate the contract. The court, in *Union Turnpike Co.* v. *Jenkins*,[3] in which the question was determined, say: "Suppose the speculation had been an advantageous one, and before the first call of the president and directors, the stock had risen considerably in value, could not the directors, with propriety, have refused to consider Mr. Jenkins (the defendant) as a stockholder, on account of his not having made the payment required by the act, on his subscribing? I think they could. No possible benefit then arising from the future emoluments of the company transactions can be considered as a consideration

[1] Highland Turnpike Co. *v.* McKean, 11 Johns. 100; Goshen Turnpike Co. *v.* Hurtin, 9 id. 218; Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. 219; Trumbull *v.* Mutual Fire Ins. Co., 17 Ohio, 407; Gayle *v.* Cahawha, etc., R'y Co., 8 Ala. 586; Stokes *v.* Lebanon Turnpike Co., 6 Humph. (Tenn.) 241; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Essex Bridge *v.* Tuttle, 2 Vt. 393; Union Lock, etc., *v.* Towne, 1 N. H. 44; Wadsw. on Joint-Stock Comp. 317; Hall *v.* U. S. Ins. Co., 5 Gill. 484.

[2] Wood *v.* Coosa, etc., R. Co., 32 Ga. 273. See, also, Higland T. Co. *v.* McKean, 11 Johns. 98.

[3] 1 Cai. (N. Y.) 381.

for the promise; and if it could, none such is stated on the record."[1]

But, where a note was given in lieu of the amount required by the incorporating act to be paid at the time of a subscription, it was held, that the note was given upon sufficient consideration and was valid in the hands of the corporation, though executed before the completion of the organization.[2] And it has been held by the supreme court in Kentucky, that the failure of a subscriber for railway stock, to pay the amount required by the charter to be paid at the time of the subscription, does not exonerate him from his liability for his subscription, as it would be his duty to pay it, and he should not be permitted to take advantage of his own wrong.[3] So, in Louisiana, a stock subscriber, who had not paid the five per centum on the amount of his stock at the time of subscribing, as required by the charter of the company, it was held, could not avail himself of such a defense, for it was his duty to make the payment, and that to sustain such a defense, would be to permit him to avail himself of an advantage from his own wrong.[4]

SEC. 79. The liabilities of the subscribers may depend upon other conditions imposed by the charter or act of incorporation. Thus, when by the act under which the corporation was created, it was provided that the capital stock should be divided into five thousand shares, of not exceeding $100 each, and that after one thousand shares should be subscribed for, a meeting of the sub-

[1] See, also, same doctrine in Hibernia Turnp. Co. v. Henderson, 8 S. & R. 219. But in a dissenting opinion in this case, DUNCAN, J., said: "If this defendant had obtained a receipt from the commissioners and had given his note to the company for the money to be paid in advance, it could be recovered. Has he not done this? for the subscription includes this, and is a note for five dollars payable on demand; and the company could have recovered though no note had been given."

[2] Vermont Central Ry. Co. v. Clayes, 21 Vt. 30. See, also, People's Ferry Co. v. Balch, 8 Gray, 314; Troy R. Co. v. Newton, id. 596. But see, also, Lexington R. Co. v. Chandler, 13 Metc. 311.

[3] Wight v. Shelby Ry. Co. 16 B. Monr. 4. See also, under provisions of the Ohio statute, Chamberlain v. Painesville, etc., R. Co., 15 Ohio St. 225; Ashtabula, etc., R. Co. v. Smith, id. 328.

[4] Vicksburgh R. Co. v. McKean, 12 La Ann. 638.

And where in lieu of a cash payment, required by the charter on the first installment, the subscriber gave his promissory note, this was held a sufficient compliance. McRae v. Russell, 12 Ired. 224; Selma & Ten. R. Co. v. Tipton, 5 Ala. 787; Tracy v. Yates, 18 Barb. 152; Greenville & Col R. Co. v. Woodsides, 5 Rich. 145; Mitchell v. Rome R. Co., 17 Ga. 574. See, also, Everhart v. West Chester & Phil. R. Co., 28 Pa. St. 339.

scribers might be called for the purpose of organizing the corporation, and providing for the management of its affairs; it was held, by the supreme court of Massachusetts, that no call for the payments of subscription could lawfully be made for the general objects of the corporation, until the five thousand shares had been subscribed for, although a call might be made before that time to defray the expenses incurred in effecting the incorporation.[1]

SEC. 80. It may be stated as the general, if not the universal rule in this country, that where the constating instruments fix the number of shares, or the amount of the capital stock to be subscribed, or the sum which must be paid thereon, before the corporation can enter upon the business for which it was organized, these conditions must be, in good faith, complied with.[2]

SEC. 81. And under an English act of incorporation which provided, that the sum of £100,000 should be subscribed before any of the powers and provisions of the act should be considered in force, it was held that the full sum required should be subscribed before any call could be made on the subscription.[3]

[1] Salem Mill Dam Corp. v. Ropes, 6 Pick. 23.

But if, by the charter, a bank is restricted from operation until a certain amount of stock is subscribed, a subsequent purchaser of the stock could not be prejudiced by the fact that a certain amount of the stock was fraudulent and fictitious, and secured by collusion between the original subscribers and the commissioner, for the purpose of evading the limitations of the law, provided the purchase was *bona fide*, and without notice of the fraud. Minor v. Mechanics' Bank, 1 Pet. 46; Walker v. Devereaux, 4 Paige, 229; Johnston v. South West R. Co., 3 Strobh. Eq. 263; Ang. & Am. on Corp., § 146.

[2] As bearing on these propositions, consult opinion of PARKER, J., in Schenectady, etc., R. Co. v. Thatcher, 11 N. Y. 102. See, also, Salem Mill Dam Co. v. Ropes, 6 Pick. 23; Same v. Same, 9 id. 187; Central T. Co. v. Valentine, 10 id. 142; Stoneman Branch R. Co. v. Gould, 2 Gray, 277; Troy, etc., R. Co. v. Newton, 8 id. 596; Cabot, etc., Bridge Co. v. Chapin, 6 Cush. 50; Worcester, etc., R. Co. v. Hinds, 8 id. 110; Atlantic Cotton Mills v. Abbott, 9 Cush. 423; Lexington, etc., R. Co. v. Chandler 13 Metc. 311; Harlam Canal Co. v. Seixas, 2 Hall, 504; Rensselaer, etc., R. Co. v. Wetsel, 21 Barb. 56; Haun v. Mulbury, etc., R. Co., 33 Ind. 103; Hain v. G. W. G. Co., 41 id. 196; Fox v. Allensville Co., 46 id. 31; Peoria, etc., R. Co. v. Preston, 35 Ia. 115; Shurtz v. Schoolcraft, etc., R. Co., 9 Mich. 269; Oldtown, etc., R. Co. v. Veazie, 39 Me. 571; Penobscot R. Co. v. Dummer, 40 id. 172; Same v. White, 41 id. 512; Littleton Manuf. Co. v. Parker, 14 N. H. 543; Contocook Valley R. Co. v. Barker, 32 id. 363; New Hampshire, etc., R. Co. v. Johnson, 30 id. 390.

[3] Norwich, etc., Co. v. Theobald, 1 Moo. & Mal. 151.

The same doctrine has been frequently recognized in this country.[1] The condition imposed in such cases is a condition precedent; and no authority to act is conferred, until it is fully complied with. But where the charter of a railroad company provided for certain commissioners to receive subscriptions, and that they should "receive no subscriptions to said stock unless five per centum thereof in cash should be paid to them at the time of subscribing, and should they receive subscriptions to said stock without payment, they shall be personally liable to pay the same to said corporation when organized," it was held, that this clause was not a condition precedent to the organization of the company, but a mere personal liability imposed on the commissioners.[2]

SEC. 82. **Conditional subscriptions.** — Conditions also, affecting the liability of subscribers, may, of course, be expressly provided for in the contract; and unless they violate the fundamental law of the corporation, or are manifestly fraudulent, or must result in the prejudice of innocent parties, they will be upheld. Thus, where a subscription was made to the capital stock of a corporation upon the express condition that the company should not be organized, or should not enter upon the object of its organization, until a certain amount of its capital stock should be subscribed for, the supreme court of Maine held, that such a condition was a condition precedent, and that the company was not authorized to enforce the collection of such a subscription, until the conditions were complied with by the company.[3] And where, on the organization of a corporation, the number of shares of the capital stock and the sum to be paid on each are fixed by vote, and inserted in the agreement of subscription, the organization is not bound to proceed, and the subscribers may refuse to pay any part of their subscriptions until the requisite number of shares are subscribed for, as fixed by vote.[4]

[1] Salem Mill Dam Corp. v. Ropes, 9 Pick. 187; Central Turnpike Co. v. Valentine, 10 id. 142; Worcester, etc., R. Co. v. Hinds, 8 Cush. 110; Littleton Manuf. Co. v. Parker, 14 N. H. 543.

[2] Blair v. Rutherford, 31 Tex. 465 (1868).

[3] Penobscot, etc., R. Co. v. Dunn, 39 Me. 589; Chamberlain v. Ashtabula, etc., R. R. Co., 15 Ohio St. 225; Ashtabula, etc., R. R. Co. v. Smith, id. 328.

[4] Cabot, etc., Bridge Co. v. Chapin, 6 Cush. 50.

And where stock was subscribed for on condition that the citizens of a certain town should take a certain amount of stock, it was held, that no assessment could be properly made on the subscriber until the condition was complied with.[1]

SEC. 83. By an act of the legislature of Pennsylvania, commissioners were appointed to receive subscriptions to stock, for the purpose of constructing a railroad; and it was provided, that no subscription should be valid unless $5 should be paid on each and every share at the time of the subscription; that when a certain number of shares should be subscribed for, and the $5 paid on each, the same should be certified to the governor, who should thereupon issue letters incorporating the subscribers and those who might thereafter subscribe. The letters were issued and the company organized.

It was held, by the supreme court of Pennsylvania, that a condition annexed to a subscription, that it should be binding only when a certain amount of stock had been subscribed for was valid, and that a party subscribing on that condition could not be held liable until it was shown that the condition had been complied with, and that the installments were, subsequently, called in before suit brought; but that the company had a right to accept payment for stock in labor, or materials, or damages, or any other liability of the company, provided the transaction was *bona fide*.[2]

But when the condition imposed is, that a certain number of shares shall be subscribed for, it is not competent for the subscriber to show that the number has not been subscribed for by persons pecuniarily responsible, or that the subscribers are insolvent, unless it appears that the corporation has acted in bad faith.[3]

[1] Ticonic Water Power Co. *v.* Lang, 63 Me. 480.

[2] Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318. See, also, Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174.

[3] Penobscot R. Co. *v.* White, 41 Me. 512; Salem Mill-dam Co. *v.* Ropes, 9 Pick. 187.

If the corporation acts in good faith and parties are apparently able to pay, and they finally fail and are unable to pay, this will not render the organization illegal. Id. Penobscot R. Co. *v.* Dummer, 40 Me. 172. But private arrangements with subscribers, giving them peculiar advantages over others, would be null and void. Robinson *v.* P. & C. R. Co., 32 Pa. St. 334; Bavington *v.* P. & S. R. Co., 34 id. 358; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; Downie *v.* White, 12 Wis. 176; White Mountains R. Co. *v.* Eastman, 34 N. H. 124; Mann *v.* Cooke, 20 Conn. 178; Mann *v.* Currie, 2 Barb. 294.

But Mr. Redfield observes: "Where subscriptions are made under an agreement that they are not to be binding

SEC. 84. **The conditions may be waived.**— Where, however, there is a conditional subscription which is valid, subscribers may, by their acts, waive the same, and thereby become liable as though no condition had been imposed upon the company. Thus, where there was a condition in a subscription to the capital stock of a corporation that other stock to a given amount should be taken, it was held that this was waived by the conduct of the party, in paying the first installment on the subscription, voting the whole stock at an election for officers, and acting as an officer of the corporation.[1] So, where a person who made a subscription of land to the stock of a railroad company, on a condition precedent, it was held that he waived such condition by delivering an absolute deed of the land to the company, and receiving his stock.[2]

And where the subscribers to the stock of a railroad gave their notes for the amounts of their subscriptions, payable when the road should be completed; but were subsequently induced to take up these conditional notes and give new ones, to enable the company to carry out a contract for the completion of the road, payable in four years, within which time it was confidently and honestly stated and believed by the officers, at the time, that the road would be completed, it was held, that the subscribers were liable upon the new notes, although the road was abandoned before any thing was done upon it, and the road never completed.[3] So, where a person participated in the proceedings creating a corporation, and to increase its stock and for making calls on the

unless a specified sum is subscribed, it is essential that there should be no conditions as to the liability of any of the subscribers not applicable to all. Confidential subscriptions, made for the purpose of making up the required sum, are a fraud upon the other subscribers; and should not be treated as valid subscriptions. Where, by deducting such confidential subscriptions, the required sum is not subscribed, the contract of subscription does not become operative so as to bind the subscribers. Parol evidence is admissible to show that certain of the subscriptions were confidential in character, and, therefore, fraudulent." 1 Redf. on Rail., § 48 (citing New York Exch. Co. v. DeWolf, 31 N. Y. 273).

Where there is a subscription, upon the condition that no calls shall be made, until work should be commenced upon a particular section of the line, and the subscriber gave his note for the amount on the false representation of the agents of the company that the work had been commenced, it was held that the company could not recover upon the note. Taylor v. Fletcher. 15 Ind. 80.

[1] Dayton, etc., Railway Co. v. Hatch, 1 Dis. (O.) 84. See, also, Garling v. Baechtel, 41 Md. 305; Ossipee Manf. Co. v. Canney, 54 N. H. 295.

[2] Parks v. Evansville, etc., R. Co., 23 Ind. 567.

[3] Four Mile Valley R. Co. v. Bailey, 18 Ohio St. 208.

stock subscriptions, both as stockholder and director; in a suit against him to compel payment of his installment due and payable under such calls, it was held, that he was estopped from denying the validity of the proceedings.[1]

SEC. 85. **When the condition is void.** — Corporations organized under the act of the legislature of Pennsylvania, of February 19, 1849, could receive no conditional subscriptions; and a subscription made to the commissioners under the act, conditional on the location of the road on a special route, was held to be void so far as related to the condition, and was treated as an unqualified subscription.[2]

But where the contract with the subscriber contained a condition that interest on sums assessed and paid in by subscribers should be allowed him, from the time of payment until the road should be put in operation, it was held, that such a condition did not avoid the subscription.[3]

SEC. 86. **Conditions which will avoid the whole contract.** — It is evident that there may be conditional subscriptions, which could not be justly enforced against the subscriber without a compliance with the precedent conditions for which he has stipulated, and when the conditions could not be enforced without great injustice to the company and others. Contracts of this character would be against public policy and entirely void.

Thus, in an action by a plank-road company against a subscriber to the stock of the corporation, the facts were as follows: The plaintiff was duly incorporated under the general laws of New York, providing for incorporation of turnpike and plank-road companies;[4] and its articles of association thereunder were duly filed.

[1] Kansas City Hotel *v.* Harris, 51 Mo. 464

[2] Pittsburgh, etc., R. Co. *v.* Biggar, 34 Pa. St. 455. See, also, Erie, etc., P. R. Co. *v.* Brown, 25 id. 156; Philadelphia, etc., R. Co. *v.* Hickman, 28 id. 318; Bavington *v.* Pittsburgh, etc., R. Co., 34 id. 358; Bedford R. Co. *v.* Bowser, 48 id. 29.

[3] Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536. The subscription cannot be rescinded so as to affect the rights of innocent and *bona fide* creditors, while the corporation is insolvent. Putnam *v.* New Albany, 4 Biss. 365 (1869).

[4] Act of May 7, 1850.

One article provided as follows: "For the purpose contemplated by these articles, the undersigned have severally subscribed for the number of shares of the capital stock of this association placed opposite their respective signatures hereto, and they severally agree, to and with each other, to pay to the said Fort Edward and Fort Miller Plank-road Company, their respective subscriptions for said capital stock, whenever called for by said directors or their successors in office."

The defendant did not subscribe the articles; but subscribed an instrument, in writing, which, after reciting that at a meeting of the directors of the company, it was resolved that the directors adopt and establish a terminus of their road, some convenient point at or near Saratoga Bridge, commonly called Fort Miller Bridge, in the town of Greenwich, and that the directors cause to be constructed the whole of their road, extending from Fort Edward Village to said bridge, proceeded as follows: "Now we, the undersigned, subscribe for the number of shares to the Fort Edward and Fort Miller Plank-road Company, set opposite our respective names, upon condition that the road is extended to Fort Miller Bridge, so as to make that its southern termination."

This instrument was written in a book of the company, following the record of its articles of association. The company was organized to construct a road from the village of Fort Edward to the village of Fort Miller, a distance of about eight miles, with the privilege of extending it to a point near Saratoga Bridge, about two and one-half miles further. The suit was brought for the recovery of the defendant's subscription, the directors having made the calls for the payment of the whole amount of subscriptions to stock, and given the requisite notices thereof, pursuant to the act. Judgment was rendered against the defendant for the amount of the subscription. On appeal, BOWEN, J., said: "I think the instrument signed by the defendant is wholly void by reason of the condition therein contained. It was intended as a subscription to the capital stock of the company. The act under which the plaintiff was incorporated prescribes the manner of subscribing for the stock, and only authorizes absolute subscriptions. This case cannot be distinguished in principle from *Butternuts, etc.*,

Turnpike Co. v. *North.*[1] It was held in that case that to allow subscriptions to the stock of such a corporation to be received conditioned that a particular location of the proposed road should be adopted, would be contrary to public policy, as by such means improper influences might be brought to bear upon the question of the location. The object had in view by the legislature, in authorizing the formation of these corporations, was the benefit to the public generally by providing for the construction of safe and commodious highways, so located as to be most convenient and beneficial. If the interest of the stockholders in such a company is allowed to control the question, such a location and such a termination of the proposed road will almost invariably be adopted as will best subserve the public interest, when, if in order to procure the requisite amount of capital, subscriptions are allowed to be taken, conditioned that a particular location or terminus be adopted, public convenience will frequently be sacrificed to individual interest. By the articles of association of this company their road was to be constructed from Fort Edward to Fort Miller, a distance of eight miles, with the privilege of extending it to Saratoga Bridge, two and one-half miles further, and a large majority of the stockholders became such by subscribing the articles which left it optional with the directors whether the road should be extended. These stockholders had the right not only to expect but to require that it should not be extended, unless the interest of the company would be thereby promoted; but by receiving these conditional subscriptions the directors were obliged to extend the road, although every dollar expended for that purpose will be a total loss to the corporation, and none be benefited thereby except those at whose instance it was done."[2]

SEC. 87. In other cases of a similar character the courts have held the conditional subscriptions, where not expressly prohibited by law, in the nature of a proposition to the company, and not binding as a contract, until accepted.

Thus, when a subscription was made for stock payable in certain land at a specific price, and conditioned that in case the com-

[1] 1 Hill, 518.

[2] Fort Edward, etc., Co. *v.* Payne, 15 N.Y. 583. See, also, Middlebury Turnpike Corp. *v.* Swan, 10 Mass. 384; Same *v.* Locke, 8 id. 268; La Grange, etc., Plank R. Co. *v.* Mays, 29 Mo. 64; Troy & Boston R. Co. *v.* Tibbits, 18 Barb. 297.

pany declined to take the land at the price named the subscription should be void, it was held that the subscription was a mere proposition, and until accepted by the company was not binding upon the subscriber, and that the acceptance could be made by the directors or other authorized agents.[1]

And, if subscriptions to the stock of a corporation, organized to construct a road from one place to another, the termini are a part of the contract, and if any change of these is made by the act or procurement of the company, the subscriptions are no longer binding.[2]

The subscriptions would, in the absence of other provisions as to time and mode of payment, import a promise to pay on demand, or in such manner as the directors might indicate, and on giving the notice required by law.[3]

Where a person subscribed for stock upon conditions other than those named in the articles of incorporation, and subsequently paid five per cent thereon, in an action by the company to recover the balance of installments due on the subscriptions, and the defense was a want of mutuality, and that the condition on which the subscription was made had not been performed, it was held that there was such a concurrence in the new conditions as to bind the parties, and to constitute sufficient mutuality, so as to authorize a recovery.[4]

SEC. 88. If a subscription is fraudulently made, and by collusion between the subscriber and the directors, the subscriber would not be permitted to take advantage of such fraud to defeat the rights and interests of *bona fide* holders of stock or creditors of the corporation.[5] And in Pennsylvania it has been held that a subscription is not only an undertaking to the company, but

[1] Junction, etc., R. Co. *v.* Reeve, 15 Ind. 236. See, also, Bedford R. Co. *v.* Bowser, 48 Pa. St. 29.

When accepted under such circumstances they become absolute. See Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225; Penobscot, etc., R. Co. *v.* White, 41 Me. 512.

[2] Plank Road Co. *v.* Arndt, 31 Pa. St. 317. See, also, McCully *v.* Railroad Co., 32 id. 25.

[3] Dexter Plank Road Co. *v.* Millerd, 3 Mich. 91. See, also, Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217; The Dutchess Manuf. Co. *v.* Davis, 14 id. 238.

[4] Nichols *v.* Burlington, etc., Plank R. Co., 4 Green (Ia.), 42.

[5] Minor *v.* Mechanics' Bank, 1 Pet. 46; Walker *v.* Devereaux, 4 Paige's Ch. 229; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787; Hayne *v.* Beauchamp, 5 S. & M. (Miss.) 515.

with all other subscribers; and even if fraudulent, and made for the purpose of inducing subscriptions, it is to be enforced for the benefit of the others in interest, and a subscriber will not be permitted to set up as a defense that the subscription was a feigned and fraudulent one, and that the company was a party to the fraud.[1] And when a person subscribes for stock, he cannot exonerate himself from liability to the company therefor, by assignment of the same to another without the consent of the company, unless authorized so to do by statute or the articles of association, and he is liable for all assessments legally made on the shares,[2] as the capital stock of a corporation is treated as a trust fund for the benefit of its creditors, and no transfer thereof can be made by which, as to the creditors of the company, a stockholder can relieve himself from liability for subscriptions to stock, and substitute that of another person.[3]

SEC. 89. **Subscriptions in contemplation of incorporation.** — A subscription to articles of association, setting forth amount of capital stock of the proposed company, and the number of shares, imports that the subscriber will take and pay for the number of shares set opposite his name.[4] And if made in contemplation of a charter of incorporation, it is *valid* and may be enforced by the company after it has become incorporated.[5] It constitutes a legal obligation of the subscriber, and can usually be enforced by action or by forfeiture of the shares or both, depending upon the con-

[1] Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

[2] Buckfield, etc., R. Co. *v.* Irish, 39 Me. 44; Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314; City Hall *v.* Dickinson, 6 Gray, 586; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Dayton *v.* Borst, 31 id. 435; Northern R. Co. *v.* Miller, 10 Barb. 260; Fort Edward, etc., *v.* Payne, 17 id. 567; Merrimac Mining Co. *v.* Levy, 54 Pa. St. 227.

[3] Re Bachman, 12 Bankr. Reg. 223. And in case a corporation is being wound up, and its affairs are in the hands of a receiver, a shareholder, who is also a creditor under another contract, is not entitled to set off the debt due to him thereon against calls made by the receiver on his stock, nor to set off anticipated dividends against such calls. See Green's Brice's *Ultra Vires*, 553; *Ex parte* Henry Winsor, 3 Story, 411; Cutler *v.* Middlesex Fac. Co., 14 Pick. 483; McLaren *v.* Pennington, 1 Paige, 102; Osgood *v.* Ogden, 4 Keyes, 70.

[4] Rensselaer, etc., R. Co. *v.* Barton, 16 N. Y. 457.

[5] Hamilton, etc., Plank Road Co. *v.* Rice, 7 Barb. 157; Tonica, etc., R. Co. *v.* McNeely, 21 Ill. 71; Johnston *v.* Ewing, etc., 35 id. 518. Unless the subscriber expressly dissents before the incorporation is completed, Gleaves *v.* Turnpike Co., 1 Sneed (Tenn.), 491; Dorris *v.* French, 6 T. & C. (N. Y.) 581; 4 Hun, 292 (1875).

stating instruments or articles of agreement.[1] If he subscribes for stock upon preliminary articles he may perhaps refuse to sign second articles of association, when such are provided for and required to be signed and recorded under the provisions of the statutes for incorporation. But he could not in any case withdraw his subscription for stock without the consent of his co-subscribers,[2] unless authorized so to do by the articles or incorporating acts of the association.[3]

[1] Buttershall *v.* Davis. See, also, Athol Music Hall Assoc. *v.* Carey, 116 Mass. 471; Palmer *v.* Lawrence, 3 Sandf. 161, where DUER, J., said: "The law must be considered settled, that the obligation of actual payment is created in all cases by subscription to a capital stock, unless the terms of the subscription are such as to plainly exclude it." Chester Glass Co. *v.* Dewey, 16 Mass. 94; Spear *v.* Crawford, 14 Wend. 20, where SUTHERLAND, J., observes: "The promise of the defendant and the other subscribers, although in form to take the shares subscribed by them respectively, is, undoubtedly (when taken in connection with what precedes it, and with the act of incorporation which is there referred to and in part recited), a promise not only to take the shares, but to pay for them; to take them upon the terms and conditions set forth in the subscription paper."

And when shares are payable on a call of the directors, they are also in like manner payable on the call of a duly appointed receiver. Sagory *v.* Dubois, 3 Sandf. Ch. 466.

But in a recent case in Maine where the subscribers simply agreed to take the amount of shares set against their respective names, it was construed as imposing no personal obligation to pay for the shares; and that the construction of the agreement was not affected by a provision in the charter of the corporation purporting to render the subscriber liable for the balance remaining due after a sale of his shares. Belfast, etc., R. Co. *v.* Moore, 60 Me. 561 (1872).

[2] Johnson *v.* Wabash, etc., Co., 16 Ind. 389; Kidwelly Canal Co. *v.* Raby, 2 Price (Eng. Ex.), 93, in which Baron RICHARDS said: "If Raby [the defendant] had not endeavored to withdraw, there would have been no doubt of his liability; then the question becomes whether he has in fact withdrawn, and I think he has not, inasmuch as he could not do so without the consent of all those with whom he had become engaged in the undertaking." See, also, Selma *v.* Tennessee R. Co., 5 Ala. 786; Turnpike Co. *v.* Philips, 2 Penn. & Watts, 184.

Under the Railroad law in New York, of 1848, a person could not render himself liable by subscribing a preliminary paper previous to the organization of the company, unless he subsequently subscribed the articles of association, or subscribed to the capital stock in the books directed by statute to be opened after the corporation is formed. Troy R. Co. *v.* Tibbits, 18 Barb. 297. See, also, Poughkeepsee P. R. Co. *v.* Griffin, 24 N. Y. 150; Erie R. Co. *v.* Owen, 32 Barb. 616; Lake Ontario R. Co. *v.* Mason, 16 N. Y. 451.

And when under the N.Y. act of 1850, it was required that the subscribers should pay the directors ten per cent on the amount subscribed by him at the time of subscribing, and that no subscription should be received without the payment of such sum, it was held in the court of appeals of that state, when ten per cent on the subscription was not paid at the time of subscription but forty per cent was afterward paid, that this made the subscription a valid one. Black River R. Co. *v.* Clarke, 25 N. Y. 208.

And when the subscriber gave his note for the ten per cent instead of paying the money, and the company afterward received the money on the note, it was held that the subscriber was liable as such. Ogdensburgh R. Co. *v.* Wolley, 1 Keyes, 118. But see North Stafford Steel Co. *v.* Warth, L. R. Ex. 172; Ang. & Ames on Corp., § 543.

[3] Bordentown, etc., T. Co. *v.* Imlay, 4 N. J. L. 285.

SEC. 90. **Fraud in relation to subscription.**—When a bank was incorporated under a lawful charter in Connecticut, but the parties who effected the organization fraudulently induced a person to subscribe for a portion of the stock by representing to him that his subscription would be merely nominal, and that he would not be required to pay for the stock; and the bank afterward issued a large amount of bills but soon failed and went into the hands of a receiver for the benefit of its creditors, in an action by the receiver against the subscriber, it was held that he could not, as a defense to the claim for the amount of the subscription, show the fraud or misrepresentation under which he had been induced to subscribe, as he and his associates constituted the bank, and he was a party with them in the fraud of the bank on the public.[1] So, it has been held in Illinois, that stock subscribed for must be paid, notwithstanding the giving of a note therefor was induced by the misrepresentations of the agents of the company as to the amount of stock then subscribed and the time within which the road would be completed.[2] And when a secret agreement was entered into between the directors of a railroad company and a subscriber, that he might within a specified time reduce the number of shares subscribed for, the subscription being made to appear *bona fide* for the purpose of inducing others to subscribe; in an action by the corporation for such subscription, it was held that the full amount might be recovered, as the stipulation to reduce the amount was a fraud on the other subscribers.[3] But the general rule is that

[1] Litchfield Bank *v.* Church, 29 Conn. 137; Southern Plank Road Co. *v.* Hixon, 5 Ind. 166. See, also, Ang. & Am. on Corp., § 146.

[2] Goodrich *v.* Reynolds, 31 Ill. 490; Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Andrews *v.* Ohio, etc., R. Co., 14 id. 169; Hardy *v.* Merriweather, 14 id. 203; Thornburgh *v.* Newcastle, etc., R. Co., id. 499; Dynes *v.* Shaffer, 19 id. 165. But see Wert *v.* Crawfordsville, etc., R. Co., id. 242.

[3] White Mt. R. Co. *v.* Eastman, 34 N. H. 124. See, also, Downie *v.* White, 12 Wis. 176; Crawford *v.* Pittsburg, etc., R. Co. *v.* 32 Pa. St. 141; Robinson *v.* Same, id. 334. Messrs. Angel & Ames, in their work on Corporations, on this subject observe: "When a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a *bona fide* subscriber by which he has sustained or might sustain injury, no action can be maintained against him by the corporation for the amount of his subscription, unless such subscriber has accepted the charter and by his own acts has assisted in putting it in operation; in that case he cannot avail himself of the fact that part of the stock was fictitious. And if a stock company lets off a part of its subscribers and returns them their money, other subscribers, not consenting thereto, are discharged from all liability growing out of their original subscription. If a person is induced to subscribe for stock by means of representations which are not fulfilled, it

subscriptions obtained by fraud cannot be enforced against the subscribers, and that although the rule of evidence is that parol representations cannot be permitted to vary the terms of a written agreement, still this rule will not exclude parol evidence to show such fraud as would be allowed to vitiate any other contract.[1]

has been held that he is not bound to take the stock." Ang. & Am. on Corp., § 531. See, also, relating to the effect of fictitious stock, Center T. Co. *v.* McConaby, 16 S. & R. 140; Thorpe *v.* Hughes, 3 Mylne & Cr. 742; Crump *v.* U. S. Mining Co., 7 Gratt. 352; Southern P. R. Co. *v.* Hixon, 5 Ind. 166. But when a subscriber discovers such frauds he must renounce all benefits derived from his subscription or he will be responsible. Deposit Ass. Co. *v.* Ayscough, 6 E. & B. 761. See, also, County of Crawford *v.* Pittsburgh R. Co., 32 Pa. St. 141; Pittsburgh, etc. R. Co. *v.* Graham, 36 id. 77; Same *v.* Stewart 41 id. 54; Connecticut R. Co. *v.* Baxter, 32 Vt. 805; Central R. Co. *v.* Kisch, L. R., 2 H. L. 99; Smith's case, L. R., 2 Ch. 604; Heyman *v.* European R. Co., L. R., 4 Eq. 154.

If the prospectus contains a material misrepresentation or misstatement of facts, the subscription induced thereby may be rescinded. Smith *v.* Reese Riv. Co., L. R., 2 Eq. 264; Ross *v.* Estates Investment Co., L. R., 3 Eq. 122; L. R., 3 Ch. 682; Waterhouse *v.* Jamieson, L. R., 2 H. L. Sc. 29. But the misrepresentation must be in reference to a material matter. Lenton *v.* McNeil L. R., Eq. 352; Hallows *v.* Fernie L. R., 3 Ch. 467; Jackson *v.* Turquand L. R., 4 H. L. 305.

[1] See Blodgett *v.* Morrill, 20 Vt. 509; Conn., etc., R. Co. *v.* Bailey, 24 id. 465; Same *v.* Baxter, 32 id. 805; Burrows *v.* Smith, 10 N. Y. 550; New York Exchange Co. *v.* De Wolf, 31 id. 273; S. C., 5 Bosw. 593; Coil *v.* Pittsburgh Female Coll., 40 Penn. St. 439; Kennebec R. Co. *v.* Waters, 34 Me. 369; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Martin *v.* Pensacola Coal Co., 8 Fla. 370; Rives *v.* Railroad Co., 30 Ala. 92; Smith *v.* Same, id. 650; Hester *v.* Memphis R. Co., 32 Miss. 378; Walker *v.* Mobile R. Co., 34 id. 245; Ellison *v.* Same, 36 id. 572; Henderson *v.* Railroad Co., 17 Tex. 560; La Grange R. Co. *v.* Mays, 29 Mo. 64. The general rule of evidence is that parol statements and representations, or agreements made at the time of the execution of a written contract, and inconsistent with the written terms of the same, are inadmissible and void, unless fraud is shown. See Thornburgh *v.* Newcastle R. Co., 14 Ind. 499; Johnson *v.* Crawfordsville R. Co., 11 id. 280; Hardy *v.* Merriweather, 14 id. 203; Kennebec R. Co. *v.* Waters, 34 Me. 369; Wight *v.* Shelby R Co., 16 B. Monr. 4; New York Exch. Co. *v.* De Wolf, 5 Bosw. 593; Mississippi R. Co. *v.* Cross, 20 Ark. 443; Smith *v.* Plank R. Co., 30 Ala. 650. See same, id. 650.

Mr. Redfield observes: "Oral evidence is inadmissible to vary the terms of a subscription to the stock of a railway, unless it tends to show fraud or mistake. But where the subscriber is really misled, and induced to subscribe for stock upon the representation of a state of facts in regard to the time of completing the road or its location, made by those who take up the subscription, and in good faith and upon proper inquiry and the exercise of reasonable discretion, believed by the subscriber, and which constitutes the prevailing motive and consideration for the subscription, and which proves false, it would seem that the contract of subscription should be held void, both in law and equity. 1 Redf. on Rail., § 48. (Citing Wight *v.* Shelby R. Co., 16 B. Monr. 5; Blodgett *v.* Morrill, 20 Vt. 509; Kennebec & Port. R. Co. *v.* Waters, 34 Me. 369; Henderson *v.* Railway Co., 17 Tex. 560.) But if the location is different from that provided in the charter, it has been held that the subscriber may lose his right to object thereto, and to paying his subscription on that ground, unless he resort to mandamus or injunction at the earliest convenient time. Booker, *ex parte*, 18 Ark. 338; Brownlee *v.* Ohio, Ind. & Ill. R. Co., 18 Ind. 68.

SEC. 91. **Rules depend upon the statutes or constating instruments.** — In regard to the liability of subscribers for subscriptions to capital stock, it is difficult to lay down general or universal principles applicable to all cases, as it usually depends upon the charter or act, or articles of association; and these vary in the same as well as different states. In order to determine the various questions relating to the subject which may arise, it is necessary to consult the organic and fundamental laws of the institution; and although some illustration of rules of construction of the corporate contract, and of the relations of the subscriber to the company, may be obtained from adjudications in other states under similar laws, yet it frequently happens that the questions presented only occur and are adjudicated in the state where the corporation is created.[1]

SEC. 92. **Defense to subscription on other grounds.** — It is a general rule that a corporation seeking to recover a subscription must show a strict compliance with the requirements of the laws under which it was constituted, where a defense is made on the ground of its failure in this respect.[2] But in some cases a compliance will be presumed, and in others, it will be treated as waived by the subscriber. Thus, the payment of installments on the stock subscribed for would usually be considered, as we have noticed, a waiver of the failure of strict performance of a conditional subscription and a recognition of the legal organization and existence of the corporation by the subscriber, so as to enable the company to recover the balance of the subscription.[3] And where a party subscribed for stock in and assisted in organizing a plank-road company, it was held, that he could not avoid the payment of the stock subscribed for on the ground of a failure of the company to strictly conform to the law in completing its organization.[4]

SEC. 93. Changes made in the charter by procurement of a corporation and acted upon by it, that affect the entire objects

[1] 1 Redf. on Rail., § 32; *ante*, § 78.

[2] See *ante*, § 78; Nelson *v.* Blakey, 47 Ind. 38.

[3] Maltby *v.* North Western R. Co., 16 Md. 422.

[4] Central Plank-road *v.* Clemens, 16 Mo. 359; Lane *v.* Brainard, 30 Conn. 565.

and purposes for which it was instituted where there is no provision in the fundamental law for so doing, would release the subscribers to the original stock from liability for the same.[1]

But a change in the act of incorporation enlarging the powers of the company, but not authorizing a material departure from the original design for which it was instituted, would not release those who have subscribed for the stock.[2]

A subscriber to the capital stock of a corporation agrees to be subject to the reasonable rules and regulations which may from time to time be adopted, and he cannot avoid payment of his subscription because the charter has been amended on the application of the directors, and the amendment accepted by them, reducing the number of days' notice of the call for subscription.[3]

And where the law under which a company is instituted authorizes consolidation of the corporation with others, the exercise of this power will not discharge a subscriber from his obligation.[4] So, a grant of additional powers to a corporation by an amendment of the charter, if accepted, is not always such an invasion of the contract of subscription as will relieve a subscriber from his liability to pay.[5]

SEC. 94. **Assessments and calls for payments.** — Power is usually vested in the corporation or the directors to make assessments and calls on the subscribers for the capital stock subscribed by them. The organic law of the corporation, or the by-laws, usually provide for the time and mode of payment of subscriptions, and that a certain amount or per centum of the whole shall be paid at stipulated times, or on a call therefor, made by the proper agents, and on notice thereof given to the subscribers. These provisions are also frequently incorporated in the written contract of subscription, or made a part of it.

[1] Burrows *v.* Smith, 10 N. Y. 550; McCray *v.* Junction R. Co., 9 Ind. 359; Booe *v.* Same, 10 id. 93; Union Locks Canals *v.* Towne, 1 N. H. 44; Thompson *v.* Guion, 5 Jones (S. Car.), 113; Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57; Woodhouse *v.* Commonwealth Ins. Co., 54 Pa. St. 307.

[2] Pacific R. *v.* Hughes, 22 Mo. 291.

[3] Illinois River, etc., R. Co. *v.* Beers, 27 Ill. 185.

[4] Bish *v.* Johnson, 21 Ind. 299; Hanna *v.* Cincinnati, etc., R. Co., 20 id. 30. See on the subject of consolidation, *post*, ch. 16.

[5] Gray *v.* Monongahela Nav. Co., 2 W. & S. 156. See, also, Terre Haute, etc., R. Co. *v.* Earp, 21 Ill. 291. But see Supervisors *v.* Mississippi R. Co., id. 338, where subscribers were held released.

The rights and liabilities of subscribers must depend upon the nature of the engagement, the express promise made, or the statute or articles and by-laws of the corporation.[1]

SEC. 95. A promise to pay, without limitation or qualification in the manner referred to, would make the subscriber liable on demand by the proper agent.

On the subject of calls Mr. Brice observes: "Companies having their capital divided into shares have, as incident thereto, the power to make calls. It is purely a question of internal arrangement, in whom this power is vested. It will generally be in the directors; and where it is so, a call made by those who are actually directors and not yet removed will be good.[2] But if made by persons not having the power,[3] or not acting at a board meeting when this is required, the call will be simply nugatory.[4] Calls must in all respects, both as to times and amounts, be made, whether by the company in general meeting or the directors, in such a way as to press equally upon all.[5] And for the furtherance

[1] Ang. & Am. on Corp., § 544. See, also, Tippets v. Walker, 4 Mass. 595; Palmer v. Ridge Mining Co., 34 Pa. St. 288; Littleton Manufacturing Co. v. Parker, 14 N. H. 543; Knowles v. Beatty, 1 McLean, 41; Small v. Herkimer Manufacturing Co., 2 Comst. 330; Worcester T. Co. v. Willard, 5 Mass. 80; Andover T. Co. v. Gould, 6 id. 40; Atlantic Delaine Co. v. Mason, 5 R. I. 463; Odd Fellows' Hall Co. v. Glazier, 5 Harr. (Del.) 172. But a statute authorizing a corporation to levy assessments upon its stockholders who have paid the full amount of their subscriptions, and who are not otherwise liable, is unconstitutional. Ireland v. Palestine T. Co., 19 Ohio St. 369. But if the legislature has a reserved right to amend, alter or repeal a charter, it has been held that they could authorize a corporation to assess stockholders to make up losses, although the original charter provided that no stockholder should be liable beyond the amount of his shares for any loss sustained by the company, or any debt due on the shares. Gardner v. Hope Ins. Co., 9 R. I. 194.

The liability may depend upon either the express agreement entered into, or the agreement and the provisions of the constating instruments, or the agreement as it must be interpreted by them. See Penobscot R. Co. v. Bartlett, 12 Gray, 244; Franklin Glass Co. v. Alexander, 2 N. H. 380; Portland R. Co. v. Graham, 11 Metc. 111; Kennebec R. Co. v. Kendall, 31 Me. 470. But an agreement to "pay and fill" shares in a railroad company has been held to include an agreement to pay all assessments legally made. Buckfield R. Co. v. Irish, 39 Me. 44; Penobscot R. Co. v. Dunn, id. 587; Penobscot R. Co. v. Dummer, 40 id. 172; Penobscot R. Co. v. Bartlett, 12 Gray, 244.

[2] Swansea Dock Co. v. Levien, 20 L. J. Ex. 447. Compare, Southampton Dock Co. v. Richards, 1 Man. & Gr. 448. See, also, York, etc., R. Co. v. Ritchie, 40 Me. 425; Roberts v. Ohio, etc., R. Co., 32 Miss. 373; Hays v. Pittsburgh, etc., R. Co., 38 Pa. St. 81; Ross v. Lafayette, etc., R. Co., 6 Port. (Ind.) 297.

[3] Howbeach Coal Co. v. Teague, 5 H. & N. 151.

[4] Kirk v. Bell, 16 Q. B. 290.

[5] Preston v. Grand Coll. Dock Co, 11 Sim. 327.

of corporate purposes, *i. e.*, for the *bona fide* purpose of obtaining capital, and not to enable any particular members to escape or to lessen their liabilities.[1] Of course, calls can be made only for purposes not ultra vires of the corporation. If it is intended to devote the proceeds to other purposes, the call imposes no liability either at law or in chancery upon a shareholder."[2]

SEC. 96. In this country it has been universally held, that no majority of either the corporators or of the directors can divert the capital stock of a corporation to any purpose not consistent with the original purposes of the organization; that the business of the corporation cannot be changed, abandoned or sold without the consent at least of all the corporators; that when a person takes stock in a corporation, he enters into, at least, an implied contract with the company that his interests in the corporation shall be subject to the direction and control of its proper managers in the legitimate prosecution of the business for which the corporation was created;[3] but not that he must submit to assessments or calls made to carry out purposes foreign to its original objects.

A court of chancery will interfere to restrain calls that are already made for an illegal object; but will not when the application of the proceeds is within the scope of the authority of the corporation, or of those authorized to make the call.[4] But where the purpose of those who make the call, and in whom this power is vested, for legitimate purposes, is to devote the proceeds to purposes not authorized by law, it imposes no obligation upon the

[1] Richmond and Painter's cases, 4 K. & J. 305; Gilbert's case, L. R., 5 Ch. 559.

[2] Green's Brice's Ultra Vires, 150. See, also, South Eastern R. Co. *v.* Hebblewhite, 12 A. & E. 497; Shropshire, etc., R. Co. *v.* Anderson, 3 Ex. 401; Welland R. Co. *v.* Blake, 6 H. & N. 410.

[3] Kean *v.* Johnson, 1 Stockt. 401; Black *v.* Delaware, etc., R. Co., 7 C. E. Green, 130; S. C., 9 id. 455; Zabriskie *v.* Hackensack, etc., R. Co., 3 id. 178; Clearwater *v.* Meredith, 1 Wall. 25; Hartford, etc., R. Co. *v.* Croswell, 5 Hill, 383; McCray *v.* Junction, etc., R. Co., 9 Ind. 358; Winter *v.* Muscogee, etc., R. Co., 11 Ga. 438; Middlesex T. Co. *v.* Locke, 8 Mass. 268; Sprague *v.* Ill., etc., R. Co., 19 Ill. 177; Union Locks Co. *v.* Towne, 1 N. H. 44; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Hartford, etc., R. Co. *v.* Croswell, 5 Hill, 383; Delaware, etc., R. Co. *v.* Irick, 3 Zabr. 321; Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13; Hays *v.* Railroad Co., 61 Ill. 422.

[4] See Green's Brice's Ultra Vires, 152, and notes

shareholder either in law or equity.[1] The articles of incorporation frequently provide, that when the capital stock, or a certain portion of it, shall have been subscribed, the directors shall have authority to call in the capital stock at such times as to them may seem best for the interest of the company, not exceeding a certain per centum thereof, at or within a certain time, and to give notice thereof in some manner, to the subscribers.

The remedy, for a failure to pay, may, by virtue of stipulations or provisions of the constating instruments, be confined to a forfeiture or sale of the shares of the delinquent party, or the sum paid thereon; or it may be against the subscriber personally; or, the company, by virtue of the contract, may be entitled to either or all of these remedies. If power is conferred on a corporation to sell the stock of a subscriber in default of payment of his subscription, it has been held that this is not exclusive of the usual remedy by suit, to recover the amount due.[2]

SEC. 96. **Forfeiture of stock.** — The general doctrine is, that a subscriber cannot rescind his contract by suffering a forfeiture of his stock for non-payment or of the sums paid thereon, but that the right of forfeiture belongs exclusively to the corporation, and can only be exercised by it. It may usually waive the right to forfeiture, and resort to the common-law remedy of action on the express contract to pay the amount of the subscription, unless it is otherwise provided.

If the remedy of strict forfeiture is pursued, this would usually be considered satisfaction of the claim and a bar to a suit for the amount due on the subscription contract. But whether it is a bar or not would depend upon the provisions of the contract with the company, or the provisions of the act or articles of incorporation. It might be a cumulative remedy in a larger sense than a mere choice of remedies. The fundamental law of the corpora-

[1] Mann *v.* Prentz, 2 Sandf. Ch. 258; Sagory *v.* Dubois, 3 id. 465; Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339; Graff *v.* Pittsburgh, etc., R. Co., 31 id. 489; Hays *v.* Pittsburgh, etc, R. Co., 38 id. 81; Hartford, etc., R. Co. *v.* Boorman, 12 Conn. 530. In Pennsylvania a subscription conditioned for the prosecution of the construction of a railroad, will be barred, unless the condition be performed, and a call made within six years. Pittsburgh, etc., R. Co. *v.* Graham, 36 Pa. St. 77.

[2] See *post*, § 96. See *post*, ch. 16, on Execution and the Appointment of Receivers.

tion might undoubtedly provide for a sale of stock of delinquent subscribers to satisfy the unpaid dues.[1] But unless the power to pass a by-law providing for forfeiture of the stock, or the amount paid by a subscriber thereon, in case of a failure to pay the full amount subscribed, is conferred by the organic law of the corporation, such by-law would be of no effect.[2] If the language of the charter or organic law of the corporation provides that the company may sue or declare the shares, or the sum paid thereon, forfeited, the corporation may adopt either remedy, but cannot adopt one and then resort to the other. And if there has been a strict forfeiture without a sale of the shares, when such course is authorized by the fundamental law of the corporation, courts of equity will not interfere by granting relief against such forfeiture.[3]

But the general rule seems to be that the obligation of actual payment is created by subscription to the capital stock, unless the contrary is plainly expressed by the conditions of the subscriptions, and that the right of forfeiture and sale of shares, on the failure of payment of subscriptions, is not an exclusive, but a cumulative remedy, unless otherwise provided by the terms of the subscription or the provisions of the constating instruments.[4] But in

[1] Klein *v.* Alton, etc., R. Co., 13 Ill. 514; Merrimac, etc., Co. *v.* Bagley, 14 Mich. 501. The remedy provided by the charter, of forfeiture of stock, is only cumulative, and the company may elect to sue at law for the subscription dues. Freeman *v.* Winchester, 18 Miss. 577; Ogdensburgh, etc., R. Co. *v.* Frost, 21 Barb. 541; Herkimer, etc., Co. *v.* Small, 21 Wend. 273; Troy, etc., Co. *v.* McChesney, id. 296. But see Small *v.* Herkimer Manuf. Co., 2 N. Y. 330. The option of forfeiture is with the company. Railroad Co. *v.* Rodrigues, 10 Rich. (S. C.) 278; Spear *v.* Crawford, 14 Wend. 20; Sagory *v.* Dubois, 3 Sandf. Ch. 466; Tar Riv. Nav. Co. *v.* Neal, 3 Hawk (N. C.), 520; Dutchess Cotton Mill Manuf. Co. *v.* Davis, 14 Johns. 238; Beene *v.* Cahaba, etc., R. Co., 3 Ala. 660; Gratz *v.* Redd, 4 B. Monr. 178; London, etc., R. Co. *v.* Graham, 1 A. & E. 270; Bristol, etc., R. Co. *v.* Locke, id. 25; Gray *v.* Turnpike Co., 4 Rand. (Va.) 578.

[2] Small *v.* Herkimer Manuf. Co., 2 N. Y. 330; Matter of Long Island R. Co., 19 Wend. 37.

[3] Story's Eq. Jur., § 1325. See, also, Sparks *v.* Proprietors, etc., 13 Ves. 433; Pendergast *v.* Turton, 1 Y. & C. 98.

[4] See Glass Co. *v.* Alexander, 2 N. H. 380; White Mountains R. Co. *v.* Eastman, 34 id. 147; Spear *v.* Crawford, 14 Wend. 20: Troy Turnpike Co. *v.* McChesney, 21 id. 296; Mann *v.* Currie, 2 Barb. 294; Northern R. Co. *v.* Miller, 10 id. 260; Troy, etc., R. Co. *v.* Kerr, 17 id. 581; Troy, etc., R. Co. *v.* Tibbits, 18 id. 297; Ogdensburgh, etc., R. Co. *v.* Frost, 21 id. 541; Goshen T. Co. *v.* Hurtin, 9 Johns. 217; Dutchess Cotton M. Co. *v.* Davis, 14 id. 238; Harlem Canal Co. *v.* Seixas, 2 Hall, 504; Delaware Canal Co. *v.* Sansom, 1 Binn. 70; Tar Riv. Nav. Co. *v.* Neal, 3 Hawks, 520; Greenville, etc., R. Co. *v.* Smith, 6 Rich. 91; Charlotte, etc., R. Co. *v.* Blakely, 3 Strobh. 245; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787; Gayle *v.* Cohawba, etc., R. Co., 8 id. 586; Freeman *v.* Winchester, 10 S. & M. 577;

some cases it has been held that the corporation must elect which remedy it will pursue, and that when it has a choice of remedies› it cannot pursue both; and that where there is a right of foreiture, but no express power to use both remedies, the election of the right of forfeiture precludes the right of ordinary action. Thus, under a charter containing such provisions, where an action was commenced against a subscriber, to recover certain installments, and the stock was afterward forfeited for the non-payment of a subsequent and last call, a plea of such forfeiture in bar of the further prosecution of the action was sustained.[1]

Elysville v. Okisko, 5 Miller (5 Md.), 152; Gratz v. Redd, 4 B. Monr. 178; Barnet v. Alton, etc., R. Co., 13 Ill. 504; Klein v. Alton, etc., R. Co., id. 514; Ryder v. Same, 13 id. 516; Peoria, etc., R. Co. v. Etting, 17 id. 429; Essex Bridge Co. v. Tuttle, 2 Vt. 393; City Hotel Co. v. Dickinson, 6 Gray, 586; Lexington, etc., R. Co. v. Chandler, 13 Metc. 311; Hart, etc., R. Co. v. Kennedy, 12 Conn. 499; Ward v. Griswoldville M. Co., 16 id. 593; Mann v. Cooke, 20 id. 178. On this subject Mr. Redfield observes: "But where the stock of the company is defined in its character, and is divided into shares of a definite amount in money, a subscription for shares is justly regarded as equivalent to a promise to pay calls, as they shall be legally made, to the amount of the shares. This may now be regarded as settled, both in this country and in England, and that the power given the company to forfeit and sell the shares, in cases where the shareholders fail to pay calls, is not an exclusive, but a cumulative remedy, unless the charter or general laws of the state provide that no other remedy shall be resorted to by the company." 1 Redf. on Rail., § 49. See, also, Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499; Mann v. Cooke, 20 id. 178; Dayton v. Borst, 31 N. Y. 435; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Goshen Turnp. Co. v. Hurten, 9 Johns. 217; Dutchess Man. Co. v. Davis, 14 id. 238; Troy Turnp. Co. v. McChesney, 21 Wend. 296; Northern R. Co. v. Miller, 10 Barb. 260; Plank Road v. Payne, 17 id. 567; Troy & Bost. R. Co. v. Tibbits, 18 id. 297; Ogdensburgh R. Co. v. Frost, 21 id. 541; Herkimer M. & H. Co. v. Small, 21 Wend. 273; S. C., 2 Hill, 127; Sagory v. Dubois, 3 Sandf. Ch. 466; Mann v. Currie, 2 Barb. 294; Ward v. Griswold Manu. Co., 16 Conn. 593; Lexington & W. C. R. Co. v. Chandler, 13 Metc. 311; Klein v. Alton, etc., R. Co., 13 Ill. 514; Palmer v. Lawrence, 3 Sandf. Sup. Ct. R. 161; Greenville, etc., R. Co. v. Smith, 6 Rich. 91; Freeman v. Winchester, 10 S. & M. 577; Selma R. v. Tipton, 5 Ala. 787; Troy, etc., R. Co. v. Kerr, 17 Barb. 581.

But if the stockholder is only made liable after a sale of stock, the statute must be pursued, and he would only be liable for a deficiency after the sale. Grays v. Turnp. Co., 4 Rand. 578; Essex Bridge Co. v. Tuttle, 2 Vt. 393. See, also, Rensselaer & W. Plank R. Co. v. Barton, 16 N. Y. 457.

[1] Small v. Herkimer Manufg. Co., 2 N Y. 330; overruling Herkimer Manufg. Co. v. Small, 21 Wend. 273, and 2 Hill, 177. See, also, Kennebec & Port. R. Co. v. Kendall, 31 Me. 470; Allen v. Montgomery R. Co., 11 Ala. 437. If in such cases the company fail to exercise their power of forfeiture, as the successive defaults occur, until all the defaults for payment of calls occur, it loses its remedy by sale. Stokes v. Lebanon, etc., R. Co., 6 Humph. 241; Harlem Can. Co. v. Seixas, 2 Hall, 504; Delaware Canal Co. v. Sansom, 1 Binn. 70.

SEC. 97. **Assessments; rules in relation to.** — Assessments, in connection with corporate stocks, is understood to mean a rating by the members or the board of directors of a corporation, by installments, of which notice is usually required to be given; and after such assessment and the requisite notice is given, and the period for payment has passed, then an action will lie for the amount of the subscription due.[1] Where the charter of a railroad corporation contained a provision that the capital stock should be of not less than a certain number of shares, it was held that assessments laid before the requisite number of shares had been subscribed, were invalid.[2] This was in the absence, of course, of any provision authorizing assessments where a less amount was subscribed.

SEC. 98. If the power to lay assessments is vested exclusively in the corporation, it cannot be delegated to the directors;[3] but if authority is given to a corporation by an act of the legislature, to raise a fund in addition to their capital stock by assessment on the stockholders, the corporation may confer the power on the directors to lay assessments for this purpose.[4]

And where the articles of incorporation of a railway company restricted the installments of stock that might be called for in any one year, by the board of directors, to twenty-five per centum of the whole amount, and also provided for a change in the articles by the votes of the directors, and a change was so made in compliance with the general statutes on that subject, by which the directors were authorized to assess five per centum per month, it was held that such change was binding upon the stockholders who subscribed previous to such alteration.[5]

In this case the supreme court of Iowa say: "The charter of the company, plaintiff in this case, provides that the articles of incorporation are formed and adopted under and in pursuance of the forty-third chapter of the Code of Iowa, (1851) which pro-

[1] Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276.

[2] Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

[3] *Ex parte* Henry Winsor, 3 Story, 411.

[4] Marlborough Manuf. Co. *v.* Smith, 2 Conn. 579; Middletown, etc., Turnp. Co. *v.* Watson, 1 Rawle, 330.

[5] Burlington, etc., R. Co. *v.* White, 5 Ia. 409; South Bay, etc., Co. *v.* Gray, 30 Me. 547. But see, when the charter is amended after subscription, but before completing the organization reducing the number of shares required to be taken before organization, Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

vides for changes in the charter, which, when recorded and published as the original articles are required to be, are valid. In view of this provision of the law and the articles of the charter, which authorizes changes to be made by the board of directors, or by the stockholders, we do not think the defendant can, with justice, allege that his liability has been increased or changed without his consent. He consented to the change being made, and authorized the company to call for payment of his subscription stock, at the rate of five per centum per month, by becoming a member of the corporation."[1]

SEC. 99. Under a statute which authorized the directors of a company to require "payment from subscribers to the capital stock, of the sums subscribed by them, at such times and in such proportions and on such conditions as they shall see fit," it was held that the directors were invested with full discretionary power as to time and manner of payment, and that they might require the whole subscription to be paid at one time or in installments.[2] But a general resolution of a railroad company forfeiting stock for non-payment of installments, must declare to the stockholder that they claim to forfeit his specific stock, or it will not be valid.[3] And where the capital stock is to be paid at such times and in such proportions as required by the president and directors, though the shareholders will be liable to third persons for their subscriptions whether called in or not, yet the call being an uncertain event forms a condition which, as between the subscribers and the corporation, suspends the obligation to pay until called in.[4]

SEC. 100. Where the terms of the subscription required that assessments should not exceed five dollars on each share at any one time, it was held that, if no greater sum was payable at one time, several assessments might be voted at one time, and that the records of the corporation are competent evidence to show who were the corporators, and number of shares that had been taken

[1] See same doctrine in Mowrey v. Indianapolis, etc., R. Co., 4 Biss. 78.

[2] Haun v. Mulberry, etc., R. Co., 33 Ind. 103.

[3] Johnson v. Albany, etc., R. Co., 40 How. Pr. 193.

[4] Purton v. N. O., etc., R. Co., 3 La. Ann. 19.

at the time of the one assessment, unless some proof be introduced to destroy their effect.[1] So, where an act of incorporation provided that the members might divide the capital stock into as many shares as they might think proper, and by a written agreement, they fixed the capital stock at $50,000, and divided it into 500 shares of $100 each, but only 138 shares were taken, it was held that no assessment for the general purposes of the corporation could be legally made until all the shares were taken.[2] And if the proper officers of an insolvent corporation have neglected to call in unpaid subscriptions due to the company from solvent stockholders, in a proper proceeding in chancery by a judgment creditor of such company against the company and such stockholders, the court may decree payment by such stockholders to such judgment creditor, to the extent of such amounts of subscription as remain unpaid.[3]

Where the charter of a railroad company provided that, if any stockholder should omit for the space of six months to pay any installments on his shares which might be called for, the managers of the company might declare such shares forfeited; and the defendant paid two installments on his shares when called for, after which the company made a general assignment for the benefit of its creditors, and a call for a third installment was made at the proper time by the managers without the approval or disapproval of the assignee, it was held that the managers had the authority to declare the defendant's shares forfeited for the nonpayment.[4]

SEC. 101. **Notice of assessments or calls.**—Notice of the assessment or call is usually provided for by the act, or articles of association, or the by-laws of the corporation, to be given personally or by publication to delinquent subscribers before proceedings can be taken to recover the same by suit at law, or by forfeiture of shares or sums paid on them. The mode and manner of proceeding and the length of notice is generally thus provided for,

[1] Penobscot, etc., R. Co. *v.* Dummer, 40 Me. 172. But a contrary doctrine seems to be held in Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276.

[2] Littleton Manuf. Co. *v.* Parker, 14 N. H. 543; Contoocook, etc., R. Co. *v.* Barker, 32 id. 363.

[3] Bassett *v.* St. Albans, etc., R. Co., 47 Vt. 313.

[4] Germantown, etc., R. Co. *v.* Fitler, 60 Pa. St. 124.

and of which provisions the stockholders would be bound to take notice.

But, whatever be the requirement of the corporation in this respect, it should be strictly followed in order to entitle it to the remedies provided in case of the neglect or default of the subscriber to attend to the call, and make the payment required; and especially when there is authority in the company to forfeit the shares.[1] But a judgment for an installment on a subscription was sustained, where it did not appear that the defendant had any notice of a call for the same, as it did not appear that the charter required notice to be given.[2]

SEC. 102. **Sufficiency of.** — The notice, when required, in case of authority to sell by virtue of a power in the company for that purpose, should express the time and place of sale, and should be reasonably sufficient in the absence of provisions as to the length of notice, for the purposes for which it is required or intended. Thus, it was held, in Massachusetts, that a notice that shares in a railroad company would be sold for non-payment of assessments on a day fixed, and by an auctioneer named, who was and long had been an auctioneer in the place at which the notice bore date, was held to be insufficient, as it did not express the place of sale; and three days' notice of the time and place of sale was held to be unreasonably short, and, therefore, insufficient, where the owner resided at a distance.[3]

[1] Cornwall G. C. M. Co. *v.* Bennett, 5 H. & N. 423; S. C., 6 Jur. (N. S.) 589; Anglo-California G. M. Co. *v.* Lewis, 6 H. & N. 174; S. C., 6 Jur. (N. S.) 1376; 1 Redf. on Rail., § 497; Ang. & Am. on Corp. 517 *et seq.*, and notes.

[2] Wilson *v.* Mills Valley R. Co., 33 Ga. 466. If installments are regularly assessed in accordance with the terms provided in the subscription, no notice of the assessment, or of time and place of payment of the same, is required. See Lake Ontario R. Co. *v.* Mason, 16 N. Y. 451; Smith *v.* Indiana, etc., R. Co., 12 Ind. 61; Eakright *v.* Logansport, etc., R. Co., 13 id. 404; New Albany R. Co. *v.* McCormick, 10 id. 499; Breedlove *v.* Martinsville R. Co., 12 id. 114; Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33; Smith *v.* Plank-road Co., 30 id. 650. The manner prescribed for giving notice has been, in some cases, considered as directory only; and it has been held that notice may be given in a different manner, if the subscriber can sustain no injury thereby; as for instance, a personal notice to the subscriber, where one by publication is prescribed. See Lexington R. Co. *v.* Chandler, 13 Metc. 311; Mississippi R. Co. *v.* Gaster, 20 Ark. 455. But see Lewey's Island R. Co. *v.* Bolton, 48 Me. 451; Rutland R. Co. *v.* Thrall, 35 Vt. 547. Where the fundamental law prescribes a certain length of notice before suit can be brought, such notice must be given. Id.

[3] Lexington R. Co. *v.* Staples, 5 Gray, 520.

Where a by-law of a corporation provided for a notice to be given of sales of shares for non-payment of assessments, by advertisement, designating the time and place thereof and the shares to be sold, it was held that any description sufficing to show clearly what shares were intended to be subject of sale, was sufficient;[1] and where a charter provided that for non-payment of assessments "the directors may order the treasurer to sell such shares at auction, * * * and the delinquent subscriber shall be held accountable for the balance, if the shares sell for less than the assessments," and the directors voted that the president and treasurer be a committee to collect arrearages, and enforce such collections by sales or otherwise, it was held that a sale under this vote was void; that the directors could not delegate the power of ordinary sales to a committee; and that the order to the treasurer must be absolute and not in the alternative.[2]

And when the charter authorizing a sale of the stock of delinquent subscribers required notice of the assessment to be given thirty days before the order of the directors for the sale of the shares, and that the treasurer should give to the subscriber the notice in hand signed by the treasurer, or by a director on his behalf, it was held that a notice of the assessment thirty days before the sale, or a notice to the subscriber in hand not signed by the treasurer or a director, was insufficient.[3]

But, when an act of incorporation requires that the place of payments of stock shall be designated in the notice requiring payment, a notice requiring payment to be made to a certain person residing in a certain city is *prima facie* a compliance with the statute.[4] And notice to pay installments of a subscription to the treasurer of a company implies that it should be made to him at his office, and is a sufficient designation of the place of payment.[5]

[1] York, etc., R. Co. v. Pratt, 40 Me. 447.

[2] York, etc., R Co. v. Ritchie, 40 Me. 425.

"The proceedings in making the calls must have been substantially in conformity with the charter and by-laws of the company and the general laws of the state at the time of making the same. Any subsequent ratification by the directors, of an informal call, will only give it effect from the date of the ratification." 1 Redf. on Rail., § 49, par. 8. See, also, id., § 49, par. 10, 11.

[3] Id. Lewey's, etc., R. Co. v. Bolton, 48 Me. 451.

[4] Troy, etc., R. Co. v. McChesney, 21 Wend. 296.

[5] Muskingum, etc., Co. v. Ward, 13 Ohio, 120.

SEC. 103. **Rights of stockholders to dividends.**—It will be manifest that the stockholder must have various rights growing out of the relation which he sustains to the corporation, which we will consider in this connection. The most important of these, and usually the sole object of the relation, is the right to share in the profits of the association in the proportion which the stock he owns bears to the whole capital stock used in the enterprise for which the corporation was organized.

Among the regulations which may be made by the corporators is that relating to dividends on the shares of capital stock invested and held by the stockholders. Dividends are usually declared by the proper officers of the corporation periodically, as required by its by-laws; and thereupon the holders of the shares become entitled to the amount so declared as their share of the profits.[1]

But the stockholders have no claim to a dividend until it is declared. Until that time the profits belong to the corporation precisely the same as any other property which the corporation may own.[2] And when the dividend is declared and distribution ordered of the profit fund, whether in whole or in part, it should be distributed between those who at the time were owners of the stock, and in proportion to the shares owned by them.[3] The company is bound to pay the dividends which may be declared to the true owners only;[4] and these are usually determined by an inspection of the proper books of the company.[5]

[1] The directors of a corporation have authority to declare dividends and to fix the time and place of payment, with such limitations as reason and good faith may require. King *v.* Paterson, etc., R. Co., 29 N. J. L. 82. But the acceptance of a dividend by a stockholder is no ratification of illegal conduct of directors in relation thereto. Hilles *v.* Parish, 14 N. J. Eq. 380. A corporation is liable to one of its stockholders to whom it fails to distribute his proper quota of a dividend which has been declared. Jackson *v.* Newark, etc., Plank R. Co., 31 N. J. L. 277. See, also, *post*, § 107.

[2] If the corporation uses its surplus to buy up some of its own stock, the stockholders have no right to claim this *pro rata*, until it is ordered to be divided among them. Coleman *v.* Columbia Oil Co., 51 Pa. St. 74; Wiltbank's Appeal, 64 id. 256; St. John *v.* Erie R. Co., 10 Blatchf. 271; Bradley *v.* Holdsworth, 3 M. & W. 422.

[3] Goodwin *v.* Hardy, 57 Me. 143; March *v.* Eastern R. Co., 43 N. H. 515; Gifford *v.* Thompson, 115 Mass. 478. The unpaid dividends are assets and liable for the debts of the company. Curry *v.* Woodward, 44 Ala. 305; Hill *v.* Newichawanick Co., 48 How. Pr. 427; Coleman *v.* Columbia, etc., R. Co., 51 Pa. St. 74. See, also, *post*, §§ 107, 401, *et seq.*

[4] Southwestern, etc., R. Co. *v.* Thomason, 40 Ga. 408.

[5] Jones *v.* Terre Haute, etc., R. Co., 17 How. Pr. 529; compare, Currie *v.* White, 37 id. 330; 6 Abb. Pr. (N. S.) 352; Bank of Utica *v.* Smalley, 2 Cow. 770.

It has been held that dividends are to be considered paid to the stockholders, when they have received credit on their stock notes in the possession of the company.[1] And a declaration of a dividend by a corporation on a part of its capital stock raises a presumption that the same is declared on all, and it has been held that this presumption was sufficient basis for a tax, and that for the purposes of taxation it might be assumed that the same dividend had been declared on all the stock.[2] But a shareholder has no legal right to the profits of his shares until a division is made, and a contract by him in reference to dividends and profits upon his stock includes only dividends or profits ascertained and declared by the company and allotted to him, and not profits to be ascertained by third persons or courts of justice, upon investigation of the accounts and transactions of the company.[3]

SEC. 104. The general rule is, that the purchaser of stock has a right to receive all dividends subsequently declared, without reference to the time they were earned.[4] And dividends divisible among the shareholder must be considered as their property, and cannot be applied by the directors to any purpose not provided for by the act or articles of incorporation, without the consent of the shareholders.[5]

And if one sells stock to another, and is unable to have the transfer registered in consequence of a failure of the corporation, and he, therefore, remains the registered owner, he is entitled to recover of the vendee any assessments he may have been obliged to pay on the stock, after the assignment.[6]

[1] Citizens, etc., Ins. Co. *v.* Lott, 45 Ala. 185.

[2] Atlantic, etc., Tel. Co. *v.* Commonwealth, 3 Brewst. (Pa.) 366. See, also, as to the proper basis of taxation of stock, Boston, etc., R. Co. *v.* Commonwealth, 100 Mass. 399.

[3] Goodwin *v.* Hardy, 57 Me. 143; Minot *v.* Paine, 99 Mass. 101; Curry *v.* Woodward, 44 Ala. 305; Phelps *v.* Farmers' Bank, 26 Conn. 269; Hyatt *v.* Allen, 56 N. Y. 553 (1874). See, also, Spear *v.* Hart, 3 Robt. (N. Y.) 420. As to the right of stockholders to dividends; their amount, how payable; and the remedy against the corporation for its refusal to pay them, see Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491; State *v.* Baltimore, etc., R. Co., 6 Gill, 363; Bank of Commerce *v.* Dalrymple, 16 Md. 17; Moss' Appeal, 43 Pa. St. 23.

[4] March *v.* Eastern R. Co., 43 N. H. 515; Foote, appellant, 22 Pick. 299; Granger *v.* Bassett, 98 Mass. 462; Goodwin *v.* Hardy, 57 Me. 143; Gifford *v.* Thompson, 115 Mass. 478.

[5] March *v.* Eastern R. Co., *supra.*

[6] Grissell *v.* Bristowe, L. R., 3 C. P. 112; Coles *v.* Bristowe, L. R., 6 Eq. 149; L. R., 4 Ch. 3; Hodgkinson *v.* Kelly, L. R., 6 Eq. 496; Hawkins *v.*

In relation to dividends it has been affirmed that they are payable out of profits, and that it is not necessary that all outstanding liabilities should be paid off before they are declared and paid to the respective shareholders.[1] But this proposition should at least be given with this qualification, viz.: that the corporation is solvent. For, according to principles of justice in such cases, if the corporation is insolvent, the creditors would have an undoubted right to insist that the profits should first be applied to the satisfaction of their claims.[2] And it has been held that the directors may retain the profits and invest the same in improvements; and, in lieu of the dividends which the stockholders would otherwise be entitled to, issue shares of stock, where the law or the constating instruments authorize them to increase the capital stock for any purpose. And such action, it has been held, would afford no ground for an injunction to restrain them.[3]

In *St. John* v. *Erie R. R. Co.*[4] the court say: "Net earnings are properly the gross receipts, less the expenses of operating the road, or other business of the corporation. Interest on debts is paid out of what thus remains, that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the net earnings."[5]

A recent case, in the court of appeals in New York, will serve to illustrate the legal rights in such cases. A stockholder brought a suit against a corporation, to compel it to declare a dividend.

Maltby, id. 505; Cruse *v.* Paine, id. 641; Castellan *v.* Hobson, L.R., 10 Eq. 47; Bowering *v.* Shepherd, L. R., 6 Q. B. 309; Shepherd *v.* Gillespie, L. R., 3 Ch. 764.

[1] Green's Brice's Ultra Vires, 130.

[2] Scott *v.* Eagle Ins. Co., 7 Paige, 198; Karnes *v.* Rochester, etc., R. Co., 4 Abb. Pr. (N. S.) 107.

[3] Howell *v.* Chicago & N. W. R. Co., 51 Barb. 378; Atkins *v.* Albree, 12 Allen, 359; Minot *v.* Paine, 99 Mass. 101; Boston, etc. R. Co. *v.* Commonwealth, 100 id. 399; Daland *v.* Williams, 101 id. 571; Leland *v.* Hayden, 102 id. 542; Rand *v.* Hubbell, 115 id. 461; Gifford *v.* Thompson, id. 478; Earp's Appeal, 28 Pa. St. 368; Wiltbank's Appeal, 64 id. 256. A dividend is a debt that is payable only in legal tender currency. Ehle *v.* Chittenango Bank, 24 N. Y. 548. But see Scott *v.* Central, etc., R. Co., 52 Barb. 45.

[4] 10 Blatchf. 271; affirmed in the Sup. Ct. of the United States, in 22 Wall. 146.

[5] See, also, opinion of BRONSON, J., in People *v.* Supervisors, 4 Hill, 20; S. C. on appeal, 7 id. 504.

The facts were as follows: The corporation had on hand, on deposit and securities, $36,000. Its floating debt was $1,000, and the funded debt payable in seventeen years at 6 per centum was $75,000. The yearly current expenses, including interest on the funded debt, was about $10,000, and the corporation had no immediate need of the surplus on hand, or of its earnings, except to pay the current expenses. The court observed: "The property of every corporation, including all its earnings and profits, belongs, primarily, to such corporation, exclusively, and not to its stockholders, individually or collectively. They have a certain claim, it is true, but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of ownership than the former. No stockholder can entitle himself to any dividend, or to any portion of the capital stock, until all debts are paid. The funds on hand, which the plaintiff asks to have divided and distributed among the stockholders, are only about half sufficient to pay the indebtedness of the defendant. It is of no sort of consequence, in a legal point of view, that the debt is not yet due, and has a number of years to run before it matures. The creditors still have the better right to the funds, which the defendant holds for them in trust. The court cannot undertake to say, judicially, that the future business of the corporation will be prosperous, nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue. The board of directors, in their discretion and in view of all the facts within their knowledge, might do this, but no court, I apprehend, would ever undertake to deal in such a manner with the funds of the corporation which was indebted to an amount at least double the fund sought to be distributed. * * * The corporation does not stand in any fiduciary relation to its stockholders. * * * The stockholders are in no sense creditors of the corporation, nor are they in the situation of partners. They are constituent parts of the corporate body. In a general sense, a corporation may be regarded as the trustees of its creditors, but not of its stockholders. The action has, therefore, no foundation of a trust to support it."[1]

[1] Karnes v. Rochester, etc., R. Co., 4 Abb. Pr. (N. S.) 107; Utica v. Churchill, 33 N. Y. 238. See, also, People v. Commissioners, 35 id. 423; S. C., 4 Wall.

SEC. 106. When a dividend is declared, it becomes a debt due from the corporation to the individual stockholder, and if the corporation deposit the money with a bank for the benefit of the stockholder, it does not thereby release itself from liability to the stockholder, in case of a failure of the banking company to pay the same.[1] A stockholder, in a moneyed corporation, has a perfect ownership over his stock, and may, as we have seen, sell and transfer the same to whom it pleases, and the corporation has no right to restrain him in so doing. Such stock entitles the owner to his proportion of the dividends, which may be from time to time declared;[2] and a devise of the dividends, without qualification, has been held to carry with it the stocks themselves.[3]

But an agreement by a corporation to pay annual dividends to preferred stockholders, without reference to its ability to pay them from its earnings, is opposed to public policy and void.[4]

SEC. 107. **A stockholder may sue for his dividends.** — When a dividend is declared it thereupon becomes the individual property of the stockholder, and he is entitled to receive the same on demand of the proper agent. In such a case the dividend is considered as a severance of so much as belongs to each stockholder from the common fund of the corporation, and is thereafter held in trust by the company for them, and cannot be appropriated to other purposes. It is a debt due from the time it is set apart to the stockholder, and if not paid on demand he may maintain an action therefor.[5]

244; Waterman *v.* Troy, etc., R. Co., 8 Gray, 433; Cunningham *v.* Vermont, etc., R. Co., 12 id. 411; McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100; City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489.

[1] King *v.* Paterson R. Co., 5 Dutch. 82, 504.

[2] Brightwell *v.* Mallory, 10 Yerg. 196; State *v.* Franklin Bank, 10 Ohio, 90. But a stockholder must prove a demand before he can maintain an action for a dividend. Scott *v.* Central, etc., R. Co., 52 Barb. 45.

[3] Collier *v.* Collier, 3 Ohio St. 374.

[4] Lockhart *v.* Van Alstyne, 31 Mich. 76. See, also, St. John *v.* Erie R. Co., 10 Blatchf. 271.

[5] Kane *v.* Bloodgood, 7 Johns. Ch. 90; Carpenter *v.* New York, etc., R. Co., 5 Abb. Pr. 277; Jones *v.* Terre Haute, etc., R. Co., 29 Barb. 353; S. C., 57 N. Y. 196; Howell *v.* Chicago, etc., R. Co., 51 Barb. 378; Granger *v.* Bassett, 98 Mass. 462; Stoddard *v.* Shetucket, etc., Co., 34 Conn. 542; King *v.* Paterson, etc., R. Co., 5 Dutch. 82; S. C., id. 504; Jackson *v.* Plank R. Co., 2 Vroom, 277; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329; Marine Bank *v.* Biays, 4 H. & J. 338; State *v.* Baltimore, etc., R. Co., 6 Gill, 363; City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489; Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657.

SEC. 108. **Income on stock in trust.** — If shares of a capital stock of a corporation are held as a fund in trust to pay the income to a person until his death, and then convey the capital to another, the regular dividends declared and paid would of course constitute income to which the trustee, for the benefit of the *cestui que trust*, would be entitled, and also any dividends on shares of additional stock distributed as part of the net earnings of the corporation. But he would not be authorized to treat the additional stock itself as income, for the benefit of his *cestui que trust*.[1] A fund bequeathed in trust to pay the income to one until his death, and then the capital to another, included shares in the stock of a railroad corporation. This corporation, out of its net earnings accumulated during the term of the trust, bought in the market part of its own stock, invested other earnings to an amount equal to twenty per centum of the par value of the residue of its stock in property, a large portion of which was not required for the use and improvement of the railroad, and voted to create a number of new shares of the same par value, to be issued and disposed of as the directors should deem proper. The directors then voted to offer to the individual stockholders the right to take part of the new stock at par, in the proportion of twenty per cent of new shares for each old share held by the taker, and that if any individual stockholder should not avail himself of his right in this respect, they would dispose of it as they might see fit; and at the same time they declared a dividend of forty per centum on the old shares held by the individual stockholders, payable, "twenty per cent in the shares of the company which were purchased and held by this corporation in its corporate capacity, and twenty per cent in cash, derivable from the shares which the stockholders entitled to this dividend shall respectively pay for the new stock taken by them, under the terms of the preceding vote." On these facts the question presented to the supreme court of Massachusetts was, what part of the avails of the stock was income to which the tenant for life was entitled, and what part, if any, belonged to the trust fund. The court held, that of the avails of the dividend to the trustee, so much as was derived from the first twenty per cent was payable as income

[1] Minot *v.* Paine, 99 Mass. 101.

to the life tenant, and so much as was derived from the second twenty per cent accrued to the capital of the trust fund.[1]

SEC. 109. Money in the hands of the directors may be income to the corporation, but it cannot be considered income to the subscribers until a dividend is made.

Thus, where the company invests in machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvement for enlarging or carrying on their legitimate business, it does not become income to the shareholders, but it is accretion to the capital; and it is the same whether they increase the shares or the par value of the shares, or leave the shares unaltered.

And if the number of shares is increased for purposes merely speculative, it is an increase of capital stock and not of income, and it has been suggested that it would be practically unwise for courts to go behind the action of the company and attempt to ascertain how they came by the funds out of which they declare either their cash or their stock dividends.[2]

The right to take new shares on increase of the capital stock is a benefit or interest which attaches to the stock, and is not usually considered as income derived from the prosecution of the corporate business, but inherent in the shares; and it is important to understand this principle, as we have seen in cases where stock is left in trust to pay the income for life with one person with remainder of the principal to another.[3]

If a stock dividend under such circumstances is declared, the trustee would take it as capital for the remainderman, and not as income for the benefit of the life estate, although it is the result of the net earnings of the corporation.[4]

SEC. 110. **Right to sell and assign shares.** — The capital stock of an incorporated company is personal property; but the certificate of shares thereof, or other evidence of ownership or title, has none

[1] Leland *v.* Hayden, 102 Mass. 542 (1869). See, also, Wiltbank's Appeal, 64 Pa. St. 256.

[2] Boston, etc., R. Co. *v.* Commonwealth, 100 Mass. 399.

[3] Atkins *v.* Albree, 12 Allen, 359.

[4] Minot *v.* Paine, 99 Mass. 101. See, also, Daland *v.* Williams, 101 id. 571; Leland *v.* Hayden, 102 id. 542; Heard *v.* Eldredge, 109 id. 258; Rand *v.* Hubbell, 115 id. 461; Gifford *v.* Thompson, id. 478.

of the qualities of negotiable or commercial paper.[1] The owner may sell and assign such shares like any other personal property. The right of alienation is an incident of such property, as well as any other, and a by-law of the corporation prohibiting alienation, or placing restraints thereon, is void.[2]

But the purchaser or assignee of shares of such capital stock acquires no better right or title than the seller or assignor had, and takes it subject to the equitable and legal rights of the corporation, and of previous innocent *bona fide* purchasers. If the rightful owner has invested another with the usual evidence of title, or an apparent authority to dispose of the stock, he will be estopped from making any claim against an innocent purchaser dealing upon the faith of such apparent ownership or right of disposition.[3] And to entitle a party to the character of a *bona fide* purchaser, without notice of a prior right or equity, he must not only have obtained the legal right to the shares, but he must have paid the purchase-money, or some part thereof, or have parted with value on the faith of the purchase, before notice of such prior right or equity; and the mere giving of security to pay the purchase-money is not of itself sufficient to entitle the purchaser to protection.[4] A delivery of stock as collateral security for an indebtedness, with the usual power of attorney indorsed thereon, and signed by the owner in blank, transfers all the owner's title, both legal and equitable, subject only to the liens or claims of the

[1] Weaver *v.* Barden, 3 Lans. 338. See, also, Shaw *v.* Spencer, 100 Mass. 382.

[2] Moore *v.* Bank of Commerce, 52 Mo. 377. Stock in an incorporated company is property within the meaning of Civil Code of Kentucky. Field *v.* Montmollin, 5 Bush, 455. And a by-law, which imposes restraints on, or unreasonable impediments to alienation or the transfer of stock, unless the power so to do has been conferred by the fundamental law of its institution, would be void. Sargeant *v.* Franklin Ins. Co., 8 Pick. 90; Quiner *v.* Marblehead Ins. Co., 10 Mass. 476; Ang. & Am. on Corp., § 567. See, also, Robinson *v.* Chartered Bank, L. R., Eq. 32. But in Missouri it has recently been held that a by-law forbidding the transfer of stock, when the owner is indebted to the corporation, is valid, although inconsistent with the general law of the state governing general transfer of property; and in case of a sale of shares of stock under execution, the purchaser cannot recover the shares or their value, where such a by-law exists, until such indebtedness be satisfied. Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513.

[3] Weaver *v.* Barden, 49 N. Y. 286. If a *bona fide* assignee of bank stock has a valid transfer thereof on the books of the bank, and takes the same without any notice of previous assignment of the stock not entered on the transfer book, he has a prior and better right than the previous assignee. Cady *v.* Potter, 55 Barb. 463.

[4] Id. See, also, Merchants' Bank *v.* N. Y. R. Co., 3 Kern. 627.

corporation, and only the holder of the certificate, with power to transfer, can cause a transfer on the books of the company.[1]

SEC. 111. Although certificates of shares do not possess the ordinary qualities of commercial contracts or negotiable obligations, and assignments of them may be subject to all legal and equitable claims of the company, yet every reasonable facility is usually offered for the transfer of them from one to another. But, for the protection of the owner and the corporation, and to afford the latter knowledge which it may need in giving the required notice to members for certain purposes, it is usually provided that transfers of stock shall only be made on a book kept for that purpose in the office of the company, and under the care of some officer or agent appointed for that purpose, and the corporation may be responsible on general principles for any negligence or misconduct on the part of such agent in performing such duty, whereby injury results to others. A trust is thus imposed upon the corporation, and if for a failure to perform its duty a stockholder is injured, it is responsible.[2]

Thus, where one having a certificate of shares of stock in a railroad company duly assigned them to another, and afterward, on application by the assignor and the presentation to the company of an affidavit that he had lost his certificate, procured the issue of a new certificate in its stead upon giving a bond "to save the company harmless from all loss by reason of said second issue and from any liability on account of * * the stock described in said affidavit;" and the company afterward refused to allow any transfer of the stock on its books when requested by the holder of the original certificates, and the stock, of the value of seven hundred dollars, depreciated so that it became worthless, in an action therefor against the company and the assignor it was held that an action would be sustained against such company for such refusal; and that, although the bond was general assets of the

[1] Smith v. American Coal Co., 7 Lans. 317. The assignee acquires a legal title as against the assignor, but only an equitable one as against the company. But the manual delivery of the certificate is not absolutely necessary. Grymes v. Hone, 49 N. Y. 17.

[2] Ang & Am. on Corp., § 354.

company, the plaintiff could not have by subrogation a right of action in equity upon it.[1]

And when the charter provides for the transfer of shares only on the books of the corporation, still the assignment of a certificate with a written power to the assignee to transfer the stock to himself on the books is a symbolical delivery affecting those who have notice thereof, as if the transfer had been made on the books of the corporation.[2] And where one having sufficient funds in bank at the time, paid by his check for certain shares which were transferred on the books thereof to his credit, but no certificate was issued, and the bank was afterward notified of an adverse claim to his deposit, growing out of previous and independent frauds which the depositor had committed, and the bank refused to pay the check, and the assignor became a bankrupt, it was held that the assignee of the shares could not maintain a bill against the original owner and the corporation to compel a conveyance thereof.[3]

SEC. 112. Again, it has been held that where a holder of certificates of shares of stock has an irrevocable power of attorney from the former owner to transfer them, this is at least presumptive evidence of the equitable ownership of the holder; and if he is further shown to be the holder for value without notice, his title cannot be impeached, although the attorney's name is left in blank.[4] The power of attorney in such a case may be filled up, and the transfer executed by any *bona fide* holder whose name is inserted in the blank, and the power is not exhausted by the first use, nor revoked by the maker's death, nor affected by passing through any number of hands, until its execution by an actual transfer of the stock under the power. The rules of the company as to the mode of making transfers of stock and requiring the surrender of the certificate, although they may be insisted upon by the company to protect its rights, yet they do not affect the rights and interests of third persons who are ignorant of their provisions; and a transfer of stock upon the books of a company

[1] Greenleaf v. Ludington, 15 Wis. 558.

[2] Bank of America v. McNeil, 10 Bush (Ky.), 54. See, also, Hill v. Newichawanick Co., 48 How. Pr. 527.

[3] Comins v. Coe, 117 Mass. 45.

[4] Leavitt v. Fisher, 4 Duer, 1.

to a *bona fide* holder for value in such a case carries the title to the stock, although the certificate previously issued was not surrendered at the time of the transfer.[1] And the transferee of shares is not personally liable for unpaid installments due on such shares to the company in the absence of any provision in the act of incorporation making him liable under such circumstances, or any stipulation to that effect in his contract.[2]

SEC. 113. **Liability of assignees to the corporation.**—The liability of the assignee of stock to the corporation must depend upon the provisions of his contract with the assignor, and the constating instruments. If by these he is substituted to the rights of the assignor, and subject to his liabilities, then there is sufficient mutuality between the assignee and the corporation to make him liable on such subscription. If the assignment is authorized by such instruments, the liability to pay subsequent installments is changed from the subscriber to the assignee, and the assignor of the stock would be discharged from liability thereon. And especially would this be the case if such assignment was made by the express assent of the corporation.[3]

But a solvent and responsible party cannot, in case of the insolvency of the corporation or in anticipation of such an event, or for the purpose of escaping liability for the unpaid amounts due upon stock subscribed, assign the certificates to another party, and especially to an irresponsible person, and thereby be discharged from liability.[4] And where the constating instruments or by-laws

[1] New York, etc., R. Co. *v.* Schuyler, 38 Barb. 534.

[2] Palmer *v.* Ridge Mining Co., 34 Pa. St. 288.

[3] Mann *v.* Prentz, 2 Sandf. Ch. 258; Hudersfield Canal Co. *v.* Buckley, 7 T. R. 36; West Philadelphia Canal Co. *v.* Innes, 3 Whart. 198; Mann *v.* Currie, 2 Barb. 294; Cowles *v.* Cromwell, 25 id. 413; Hall *v.* U. S. Ins. Co., 5 Gill, 484; Bend *v.* Susquehanna Bridge Co., 6 Harr. & J. 128; Hartford R. Co. *v.* Boorman, 12 Conn. 539.

"One who accepts a subscription made by another on his behalf, and pays the calls made thereon and receives a certificate of ownership, is responsible as shareholder; and it makes no difference that his name does not appear upon the transfer books or the alphabetical list of stockholders as a transferee of stock. And one may become a shareholder without receiving a certificate of stock." 1 Redf. on Rail., § 53, par. 10; citing Burr *v.* Wilcox, 6 Bosw. 198.

[4] Mann *v.* Cooke, 20 Conn. 178; Everhart *v.* Chester, etc., R. Co., 28 Pa. St., 339; Graff *v.* Pittsburgh R. Co., 31 id. 489; Hays *v.* Pittsburgh R. Co., 38 id. 81. "If the former owner was indebted to the corporation, and the charter required all such indebtedness to be liquidated, before transfer of stock, such indebtedness will remain a lien upon the stock in the hands of the

require the substitution of the name on the books of the company, the subscriber cannot without a compliance with such provisions require the corporation to subrogate an assignee, and to look to the assignee for payment of the amount due upon the subscription of the original subscriber.[1]

SEC. 114. **Liability of purchasers from trustees.**—It is a familiar principle in equity jurisprudence that one who deals with a trustee, in reference to property held in trust, must act in good faith; and if he is aware of the character in which the property is held, he cannot purchase it, in satisfaction of an antecedent debt due from the trustee to him, nor can he prejudice the rights of the *cestui que trust*, by receiving the property as a pledge for the

assignee." 1 Redf. on Rail., §§ 32-4. See, also, Union Bk. *v.* Laird, 2 Wheat. 390; Marlborough Man. Co. *v.* Smith, 2 Conn. 579; Pittsburgh, etc., Co. *v.* Clark, 29 Pa. St. 146; Brese & F. *v.* Bank of Com. 271.

[1] Ryder *v.* Alton, etc., R. Co., 13 Ill. 516. See, also, *Ex parte* Bennett, 18 Barb. 339; 5 De G. M. & G. 284; 27 Eng. L. & Eq. 572, where the court say: "A subscriber for stock cannot subrogate another person to his obligation, without a substitution of his name upon the books of the company, or some equivalent act recognized by the charter and by-laws of the company. * * * The principal difficulty, in regard to liability for calls, arises where there have been transfers, and the name of the transferee not entered upon the books of the company. For, whenever the name of the vendee of shares is transferred to the register of shareholders, the cases all agree that the vendor is exonerated (unless there is some express provision of law by which the liability of the original subscriber still continues), and the vendee becomes liable for future calls. And the vendee having made such representation to the company, as to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer. And even where the party has represented himself to the company as the owner of shares, and sent in scrip certificates, which had been purchased by him, claiming to be registered as proprietor, in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged for sealed certificates on demand, he was held estopped to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered as required by the act. And where one has paid calls on shares, or attended meetings of the company, as the proprietor of shares, he is estopped to deny such membership." Citing Sheffield & Ashton-under-Lyne & Man. R. *v.* Woodcock, 2 Railw. C. 522; S. C. 7 M. & W. 574; London and Grand J. R. *v.* Freeman, 2 Railw. C. 468; S. C., 2 M. & G. 606; Cheltingham, etc., R. Co. *v.* Daniel, 2 Q. B. 281; Same *v.* De Medina, 2 Railw. C. 728; London, etc., R. Co. *v.* Graham, id. 870; S. C., 1 Q. B. 271.

If provisions are made for the transfer of shares, and these are complied with, or waived by the corporation at the request of the assignee, his liability to calls is complete. Haddesfield Can. Co. *v.* Buckley, 7 T. R. 36; Aylesbury R. *v.* Mount, 5 Scott, N. R. 127; West Phil. Canal Co. *v.* Innes, 3 Whart. 198; Mann *v.* Currie, 2 Barb. 294; Hall *v.* U. S. Ins. C., 5 Gill, 484; Bend *v.* Susquehanna Br. Co., 6 H. & J. 128; Ang. & Am. on Corp., ch. 15, § 534.

payment of a personal debt due from the trustee, or for the repayment of money advanced for his personal benefit.[1]

SEC. 115. In a recent case in Massachusetts, the question presented was, whether the holder of a certificate of stock, in which his name was inserted as "trustee," could pledge the same for his own personal debt so as to enable the pledgee to have the benefit of the same, or whether the pledgee was not put upon inquiry, from the character and limitations of the certificate, and whether, if he take the same, he does not do so at his peril, so far as any just rights of the *cestui que trust* are concerned. On these questions, FOSTER, J., in delivering the opinion of the supreme court of that state, observes: "Unless the word 'trustee' may be regarded as mere *descriptio personae*, and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust as to personalty, or a chose in action, need not be expressed in writing, but may be established by parol. And that the mere use of the word 'trustee,' in the assignment of a mortgage and note, imports the existence of a trust and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court.[2] It is insisted on behalf of the defendants, that even if there was actual notice of the existence of a trust there was no notice of its character, and that the trust might have been such as to authorize the transfer which was made. * * * But in our opinion the simple answer to this position is, that where one known to be a trustee is found pledging that which is known to be trust property to secure a debt due from the firm, of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordi-

[1] Eland *v.* Eland, 4 M. & C. 420; Watkins *v.* Cheek, 2 Sim. & Stu. 199. Mr. Kent observes: "One obvious example of this is, where a devisee has a right to sell, but he sells to pay his own debt, which is a manifest breach of the trust, and the party who concurs in the sale is aware of or has notice of the fact that such is its object, for in such a case they are coadjutors in the fraud." 2 Story's Eq. Jur., § 1131*a*.

[2] Sturtevant *v.* Jaques, 14 Allen, 523; Trull *v.* Trull, 3 id. 407. See, also, Bancroft *v.* Consen, 13 Allen, 50.

nary scope of a trustee's authority, and out of the common course of business, as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A. B., trustee for C. D.' But the effect of the word 'trustee' alone, is the same. It means trustee for some one, whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word 'trustee,' alone, has no meaning or legal effect. Inasmuch as such an act of pledging property is *prima facie* unlawful, there would be little hardship in imposing on the party who takes the security not only the duty, of inquiry, but the burden of ascertaining the actual facts at his peril. Where a partner assumes to give for his own private debt the note of his firm, the creditor who takes it must show that it was given with the assent of the other partners, because it is an apparent misuse of the name of the firm, and *prima facie* evidence of fraud.[1] But we must not go to that length in deciding the present case. Notice of the existence of a trust is by all the authorities held to impose the duty of inquiring as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of every thing to which that inquiry might have led."[2]

SEC. 116. This doctrine is equally applicable to property in the capital stock of a corporation as to other property. Where a person holding corporate stocks, as trustee for another, borrowed

[1] Eastman *v.* Cooper, 15 Pick. 290.

[2] Shaw *v.* Spencer, 100 Mass. 382. See, also, Jones *v.* Smith, 1 Hare, 55; Jones *v.* Williams, 24 Beav. 62; Butterick *v.* Holden, 13 Metc. 355; Calais Steamboat Co. *v.* Van Pelt, 2 Black (U. S.), 377; Ashton *v.* Atlantic Bank, 3 Allen, 217; Hutchins *v.* State Bank, 12 Metc. 421; Smith on Eq., tit. 1, ch. 4, 10. Where an executor disposes of or pledges his testator's assets, in payment of, or as security for a debt of his own, the person to whom they are sold or pledged will take them subject to the claims of creditors of the legatees. Elliott *v.* Merryman, 1 Lead. Cas. in Eq. 89; Hill *v.* Simpson, 7 Ves. 152. See, also, Petrie *v.* Clark, 11 S. & R. 377; Field *v.* Schieffelin, 7 Johns. Ch. 150; Walker *v.* Taylor, 4 Law Times (N. S.), 845; 2 Redf. on Wills, ch. 8, § 32.

money on certificates, by depositing them as collateral security for the repayment of the money, and used the money in his own business, and they were subsequently sold upon the failure of the trustees to repay the loan; and the certificates showed upon their face that they were issued to him as trustee; and the *cestui que trust* had never given the trustee any authority to re-invest the money, and did not know that the certificates had been used as collateral security; under these facts, it was held by the supreme court of the United States, that the parties who took the certificates had constructive notice of the rights of the beneficiary, or *cestui que trust*, and were liable to him to the full value of the stock.[1]

But in California it has been held that the mere fact that a person holding the certificates of stock and apparently having the right of disposition of the same is styled "trustee," raises no presumption that he has not authority to sell, or hypothecate it, in the usual course of business.[2] So, the corporation may be responsible to a *cestui que trust*, where it permits a transfer of its own stock wrongfully by an executor, by which the rights of innocent parties are prejudiced. A corporation, whose stock is transferable, is held to be the custodian of the shares, and is clothed with the power to protect the rights of every one from unauthorized transfers. This trust is reposed in the corporation for the protection of individual interests; and like every other trustee the corporation is bound to use due diligence and care in the execution of the trust, and is responsible for any injury sustained by its negligence or misconduct. As the corporation appoints the officers before whom the transfers must be made, it is responsible for

[1] Duncan v. Jaudon, 15 Wall. 165. Where the court will declare a trust in shares, see Price v. Minot, 107 Mass. 49. A bank, whose certificate of stock entitled the holder to so many shares which are upon their face transferable on the books of the company, by attorney or in person, when the certificates are surrendered, but not otherwise, and which allows a stockholder to transfer his stock on the books of the bank, without producing and surrendering the certificates, is liable to a *bona fide* transferee, for value, of the same stock, who produces the certificates with properly executed power of attorney to transfer; and the fact that the bank had no notice of the latter transfer is immaterial. Bank v. Lanier, 11 Wall. 369.

[2] Brewster v. Sime, 42 Cal. 139. See, also, Albert v. Savings Bank, 1 Md. Ch. 407. But in Pennsylvania, one holding stock as "trustee of M. G.," it was held, could not insist upon its transfer by the corporation, without exhibiting his authority for so doing. Bayard v. Farmers, etc., Bank, 52 Pa. St. 232.

their negligent acts, and must answer for their negligence or default, whenever the rights of third persons are concerned. Thus, where a bank permitted a transfer of its stock, standing in the name of a testator on its books, by the executor, it was held chargeable with notice of the provisions of the will under which he acted, and that an omission to examine the will and the specific bequests of the stock standing in the name of the testator, amounted to negligence on the part of the bank, and rendered it liable to the *cestui que trust* for any conversion of the stock thus wrongfully transferred by the executor.[1]

SEC. 117. **Stockholder's right to vote.**—Holding stock constitutes membership in joint-stock corporations.

We have already referred to the right of members and stockholders, as such, to vote at all corporate meetings;[2] and we shall hereafter have occasion to consider the right more fully when we come to consider the subject of corporate and directors' meetings. This right, we may here observe, is incident to the relation which the corporators bear to the corporation; and is one of those absolute rights, to deprive him of which would be a violation of his constitutional rights.[3]

SEC. 118. **Rights of stockholders to access to books.**—It will be evident from the relation which the stockholder sustains to the corporate body, that he should have the right of access to, and examination of, the books and records of the corporation, and be restricted in this respect only by the charter, or such reasonable rules and by-laws in reference thereto, as are adopted in conformity with the fundamental law of its institution, and public policy. If he is not restricted by these, a stockholder should have a right to inspect the books at reasonable and proper times;

[1] Lowrey *v.* Commercial, etc., Bank, Taney, 310. See, also, Shaw *v.* Spencer, 100 Mass. 382. But see Albert *v.* Savings Bank, 1 Md. Ch. 407. As to the right of an assignee to demand a transfer on books, see Bond *v.* Mount Hope Iron Co., 99 Mass. 505. In New York, a valid gift, in view of death, may be made by simple delivery of the certificates, with intent to transfer the stock, even though the certificates contain a general restriction upon this mode of transfer. Walsh *v.* Sexton, 55 Barb. 251.

[2] See *ante*, § 69.

[3] But it does not appear always essential that the owners of stock have a certificate thereof, to entitle them to vote at an election for directors. Beckett *v.* Houston, 32 Ind. 393.

and if this right is denied, he would be entitled to the compulsory process of mandamus to allow him so to do.[1] And if he is refused such right he could maintain an action for damages sustained by reason therefor. But, in an action against the corporation to recover a penalty provided by statute for such a refusal, it was held that the complainant must show that the officer upon whom the demand for inspection was made had notice that the person making the demand was entitled to the inspection.[2]

SEC. 119. When a statute prescribes that the stock and transfer books of incorporated companies shall be open to the examination of stockholders, a stockholder cannot be deprived of the right to inspect them because they are kept in a particular way, or because they contain, besides the information to which he is entitled, other information which he has no right to demand. If the corporation in such a case does not keep the books or records in the manner and form required, or as the statute prescribes, it is its duty to permit an inspection of such as it does keep, for the purpose of recording transactions, which the law gives the stockholders a right to know.

And when such a statute provides that the books of transfer of stock, and the books containing the names of the stockholders of such company shall be open to the examination of every stockholder for thirty days previous to any election for directors, a stockholder has a right to inspect not only the book containing the names of the stockholders, but to take memoranda or copies of the names. And if an officer, having charge thereof, refuses to permit such memoranda or copies to be made, he incurs the penalty prescribed by the statute for a refusal to allow an inspection of such books by stockholders.[3]

SEC. 120. **Holders of preferred stock.** — It frequently occurs that by virtue of authority conferred upon the corporation or vested in

[1] Cockburn *v.* Union Bank, 13 La Ann. 289; People *v.* Pacific Mail Steamship Co., 3 Abb. Pr. (N. S.) 364; 34 How. Pr. 193.

[2] Williams *v.* College, etc., R. Co., 45 Ind. 170. (1873.)

[3] Cotheal *v.* Brouwer, 10 Barb. 216; Cotheal *v.* Brouwer, 5 N. Y. 562. See, also, as to a custom of the company in such cases, to allow such transfer to be made without the consent of the board of directors, where the by-laws provided for such consent, Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

the directors, preferred stock may be created and certificates therefor disposed of by the corporation.[1] The stock certificates, issued therefor, usually show that the stockholder is entitled to the application of the net earnings of the road, to the payment of dividends or interest on such stock; and the holders thereof are entitled to the same general rights and privileges, and are subject to the same liabilities as the holders of the original or common stock, which we have already considered.[2] But although the certificates of shares of preferred and guaranteed stock of a corporation contains a clause that the stock is entitled to dividends at a certain rate per annum, out of the net earnings of the company, and that the payment of dividends is guaranteed, the holder of a certificate does not thereby become a creditor of the corporation, and cannot maintain an action at law against the corporation for a failure to declare and pay dividends.[3]

SEC. 121. **When it can be issued; dividends on.** — It is a generally received doctrine that preferred shares of stock can only be issued when the power so to do is expressly conferred upon the corporation,[4] although it has sometimes been claimed to exist as an incident to the power to borrow money, it being considered as an inducement to loans, and a method of security. This stock has priority over the common stock, and is first entitled to dividends from the profits. There is another distinction sometimes made between preferred and common stock, namely, that in reference to the latter the directors have a large discretion in reference to declaring dividends on the same, and the courts will seldom interfere with this discretion unless the abuse is manifest. Whereas, in the former, the court will inquire into the affairs of the corporation with greater scrutiny, and require payment of the current profits or net earnings on such stock, according to the terms of

[1] Green's Brice's Ultra Vires, 145 and notes; Corry *v.* Londonderry, etc., R. Co., 29 Beav. 263; 30 L. J Ch. 290; Coates *v.* Nottingham, etc., R. Co., 30 Beav. 86.

[2] For a construction of certificates of preferred stock, see Bailey *v.* The Hannibal, etc., R. Co., 1 Dill. 174; Matthews *v.* Great Northern, etc., R. Co., L. J. Ch. 357; Coey *v.* Belfast, etc., R. Co., Ir. Rep. C. L. 112.

[3] Williston *v.* Michigan, etc., R. Co., 13 Allen, 400. See, also, Taft *v.* Hartford, etc., R. Co., 8 R. I. 310.

[4] Green's Brice's Ultra Vires, 145; *Re* National Patent Steam Fuel Co., *ex parte* Worth, 4 Drew, 529; 28 L. J. Ch. 589; Hutton *v.* Scarborough Cliff Hotel Co., 2 Dr. & Sm. 521.

the contract, whenever justice and equity may require it.[1] But it is held that payments of interest on preferred stock can only be made out of profits *bona fide* earned; that a corporation has no power to pay such interest in excess of such earnings, and that all contracts for such purposes would be void.[2]

If a power to issue preferred shares exists, it is held that it must be exercised solely for the purpose of obtaining capital.[3]

SEC. 122. **Scrip and preliminary subscriptions.** — Scrip, in the sense used here, is a kind of certificate sometimes issued in England by the projectors of companies, entitling the holder to become a member and stockholder of a future company. "The liability imposed upon the scrip receiver," observes Mr. Brice, "will principally depend upon the engagement he has entered into with the projectors. He may negotiate the scrip, but he will, nevertheless, remain liable, if the company be formed, until the name of the purchaser be entered upon the register."[4] The consideration for the issue of such scrip is usually the obligation of the party receiving it to take shares in the future company.

In this country preliminary subscriptions may generally be made, and in such cases the rights secured thereby become vested in the corporation when formed, as the right to membership thereby pledged is sufficient consideration for such subscription, and the company generally may recover calls on such subscriptions after its incorporation, the same as though they were made after its complete organization. In fact, it is frequently required

[1] Bailey *v.* R. Co., 17 Wall. 96; S. C., 1 Dill. 174; St. John *v.* Erie R. Co., 10 Blatchf. 271; affirmed, 22 Wall. 136; Bates *v.* Androscoggin, etc. R. Co., 49 Me. 491; Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13; Thompson *v.* Erie, etc., R. Co., 45 N. Y. 468; Prouty *v.* Michigan S., etc., R. Co., 1 Hun, 655; McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100; Williston *v.* Michigan S., etc., R. Co., 13 Allen, 400; Barnard *v.* Vermont & Massachusetts R. Co., 7 id. 512.

[2] Pittsburg, etc., R. Co. *v.* Allegheny Co., 63 Pa. St. 126; Lockhart *v.* Van Alstyne, not reported, Mich. ; Am. L. Reg. (N. S.) 180; Curran *v.* Arkansas, 15 How. 304.

[3] Herals *v.* Great Western R. Co., L. R., 3 Ch. 262. See, also, Henry *v.* Great Northern R. Co., 4 K. & J. 1; 27 L. J. Ch. 1; Corry *v.* Londonderry, etc., R. Co., 29 Beav. 263; 3 L. J. Ch. 290; Coates *v.* Nottingham Water Works Co., 30 Beav. 86. As to the rights of holders in the different kinds of preferred shares, see Matthews *v.* Great Northern R. Co., 28 L. J. Ch. 315; Coey *v.* Belfast, etc., R. Co., Ir R., 2 C. L. 112.

[4] Green's Brice's Ultra Vires, 148; citing Midland G. W. R. Co. *v.* Gordon, 16 M. & W. 804; 16 L. J. Ex. 166. But see Jackson *v.* Cocker, 4 Beav. 59.

in organizing, under general statutes, not only that preliminary subscriptions be made, but that a certain percentage of the sum be paid as a condition precedent to the organization, and these subscriptions, if the corporation is finally organized, become binding upon the subscriber, whether scrip is issued therefor or not, and they become a part of the assets of the corporation.[1]

SEC. 123. **Stock defined, etc.** — The term "stock," as applied to joint-stock corporations, is the money or capital invested in the business, and it is usually divided into shares of equal value, held by owners or stockholders, the evidence of which is usually furnished by certificates of the same, signed and authenticated by proper officers of the corporation with the corporate seal attached.

The term "capital stock," as used in the act of incorporation in New Jersey, has been defined as the amount contributed or advanced by the stockholders as members of the company, and not to refer to the property of the corporation.[2] And, as we have already seen, shares of stock of a corporation are personal property.[3] The term "joint-stock" corporation means such a corporation as has for its object a dividend of profits among its stockholders.[4] And such dividends are personal property.[5]

SEC. 124. **Issuing certificates of shares.** — Where a charter provided that the president and directors should cause a certificate to be given to each shareholder, signed by them, and countersigned by the treasurer, certificates issued by the president alone, signed by him and countersigned by the treasurer, without authority of the directors, and without consultation, were held void, and that as the president in issuing such certificates acted without the scope

[1] On this subject see Anderson *v.* Newark, etc., R. Co., 12 Ind. 376; Johnson *v.* Wabash, etc., R. Co., 16 id. 389; Heaston *v.* Cincinnati, etc., R. Co., id. 275; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Eastern P. R. Co. *v.* Vaughan, id. 546; Lake Ontario R. Co. *v.* Mason, 16 id. 451; Rensselaer P. R. Co. *v.* Barton, id. 457; Stanton *v.* Wilson, 2 Hill, 153; Hamilton, etc., R. Co. *v.* Rice, 7 Barb. 157; Reformed, etc., Church *v.* Brown, 29 id. 335; S. C., 4 Abb. Ct. App. Dec. 31; Penobscot, etc., R. Co. *v.* Dummer, 40 Me. 172; Watkins *v.* Eames, 9 Cush. 537; People's Ferry Co. *v.* Balch, 8 Gray, 303; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Taggart *v.* West Maryland R. Co., 24 Md. 563; Griswold *v.* Peoria Univ., 26 Ill. 41; Johnston *v.* Ewing Female Univ., 35 id. 518.

[2] State *v.* Morristown Fire Ins. Assoc., 23 N. J. L. 195.

[3] See *ante*, § —; *post*, § 127; Arnold *v.* Ruggles, 1 R. I. 165.

[4] Ang. & Am., § 556.

[5] Tippets *v.* Walker, 4 Mass. 595.

of his authority, the corporation were not liable for his act.[1] But in order to make one an owner of stock in a corporation, it is not usually necessary that a certificate of his shares shall have been issued, or that the fact of ownership should appear on the books of the corporation, but it may be shown by parol.[2] And a certificate issued in the ordinary form of a certificate of stock, but containing a promise in addition thereto on the part of the corporation to pay interest thereon until the happening of a certain event, constitutes the person to whom it is issued a stockholder, and the corporation cannot, by a vote of the stockholders, oblige him to receive their bond instead of money for the interest upon such certificate.[3] If a part of the capital stock remains untaken, the right to issue it is a corporate franchise, and the property thus held is in trust for the benefit of the corporators, and if disposed of, it must be for the benefit of all the stockholders. If the directors dispose of it unequally to corporators, those injured thereby may have an action against the corporation for the damage sustained. Thus, where a resolution of the directors, carried into effect, provided for the distribution of such stock among all the stockholders who were not in arrears on shares already taken by them, and excluded those who were so in arrears, it was held to be an unlawful imposition on those in arrear, and a violation of the rights of a corporator who was ready and offered to take his portion of the new shares.[4]

SEC. 125. If stock certificates are unlawfully issued, they will be valid in the hands of innocent holders, although the considera-

[1] Holbrook v. Fauquier, etc., Turnp. Co., 3 Cranch (C. C.), 425.

[2] Chaffin v. Cummings, 37 Me. 76. And the making of a certificate and mailing of it to a stockholder was regarded as the issuing of it. Jones v. Terre Haute, etc., R. Co., 17 How. Pr. 529; Agricultural Bank v. Burr, 24 Me 256; Same v. Robinson, id. 275; Ellis v. Essex Merrimack Bridge Co., 2 Pick. 243. If a party was entitled to the certificate it would be the duty of the corporation to issue them, and a refusal so to do would justify a proceeding in chancery to compel it to issue them, and for want of them the stockholder should not be prejudiced. Chester Glass Co. v. Dewey, 16 Mass. 94; Field v. Pierce, 102 id. 253. See, also, Hoagland v. Bell, 36 Barb. 57.

[3] McLaughlin v. Detroit, etc., R. Co., 8 Mich. 100. A corporation having stock not taken may issue certificates therefor, taking in payment its own bonds. Lohman v. N. Y., etc., R. Co., 2 Sandf. 39.

[4] Reese v. Bank of Montgomery Co., 31 Pa. St. 78. But where an act of the legislature authorizes the issue of preferred stock, if it is accepted by the stockholders, it empowers the directors to issue the same, although individual stockholders may oppose it. Curry v. Scott, 54 Pa. St. 270.

tion, as between the corporation and the party to whom they are issued, may entirely fail. Thus, where the president of a corporation, in pursuance of an agreement by the directors, issued certificates of certain shares of stock to contractors, upon their entering into a contract to build the railroad in which the corporation was interested, and as a consideration therefor, and the action of the president was subsequently approved by the directors, and by a meeting of the stockholders; it was held that though the road was never built, and the stock never paid for, so that the corporation was in equity entitled to have it returned, this did not impair the validity of the stock or the legality of an election of directors chosen by votes given upon the stock so issued.[1]

And where, by statute, the affixing of the treasurer's signature to the certificates of shares of stock is required, this was held to be a ministerial duty, merely, and that it might be performed by him even after the dissolution of the corporation.[2] So certificates of stock are not necessarily invalid because issued at a place outside the state in which the corporation was organized and has its principal place of business.[3]

A stock certificate, issued by a corporation having the power to issue the same, is a continuing affirmation of the ownership of the specified amount of stock by the person mentioned therein, or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon, and to claim the benefit of an estoppel in his favor, as against the corporation, in all cases where the original owner could make such claim.[4] And a purchase from one other than the original holder of the stock, with the usual assignment and power of attorney executed in blank, in an action against the corporation for a refusal to transfer the stock on its books, is not bound to show affirmatively the title of his immediate vendor, and the presumption is that the stock was transferred and the certificates delivered in the usual course of business.[5]

[1] Savage *v.* Ball, 17 N. J. Eq. 142.

[2] Sewall *v.* Chamberlain, 16 Gray, 581. See, also, as to the right of a stockholder to certificates of shares, Field *v.* Pierce, 102 Mass. 253; James *v.* Cincinnati, etc., R. Co., 2 Dis. (O.) 261.

[3] Courtright *v.* Deeds, 37 Ia. 503.

[4] Holbrook *v.* New York Zinc Co., 57 N. Y. 616.

[5] Id.

SEC. 126. **Fraud in issuing stock certificates.** — The sale of stock, by the directors of a corporation, at a less rate than the price fixed in the charter, is a fraud upon the stockholders; and the issuing of a bond convertible into stock is the same in effect as the sale of so much stock, and the sale of such a bond is unlawful and void; and stock thus taken is, in the hands of a party with notice, subject to the right of prior subscribers to have it reduced to the charter value of the shares.[1] And the purchaser of stock illegally issued by the directors of a company at less than the charter price, may rescind his contract and recover from his vendor, who participated in the illegal issue of the stock, the money paid for the same.[2]

SEC. 127. **Shares and income; character and quality of, as property.** — "A share is a mere ideal thing — it is no portion of matter, it is no portion of space, it is not susceptible of tangible and visible possession actual or constructive. It is not, therefore, a chattel personal susceptible of possession actual or constructive."[3]

Corporations may take and hold real or personal property, but the members are not as such entitled to, or invested with the property thus held. "The interest of each individual shareholder is a share of the net produce of both, when brought into one fund."[4] It is not unusual for statutes to declare the shares and dividends to be personal property; and to be transferable like other personal property.[5] But in the absence of any statutory provision, it would be regarded as such, whether they arise out of real or personal property. On this subject Baron ALDERSON in a case before him observed: "In the first place, there is a corporation to whose management the joint stock of money subscribed by its individual corporators is intrusted. They have power, at their pleasure, of vesting it in real estate, or in personal estate, limited only as to amounts, and of altering from time to time the species of property they may choose to hold; and in order to give them greater facilities and advantages, certain powers are

[1] Sturges v. Stetson, 1 Biss. 246.
[2] Arnold v. Ruggles, 1 R. I. 165.
[3] Fosdick v. Sturges, 1 Biss. 255.
[4] Bradley v. Holdsworth, 3 M. & W. 422; Bank of Waltham v. Waltham, 10 Metc. 334; Tippets v. Walker, 4 Mass. 595; Ang. & Am. on Corp., § 443, *et seq.*
[5] Stat. Geo. 1, c. 19, § 9; Williams' Law of Personal Prop. 151. See, also, Union Bank of Tenn. v. State, 9 Yerg. 490.

intrusted to the undertakers, by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint stock by the body corporate more profitable, but they form no part of their joint stock itself; and one decided test is this, that they belong inalienably to the corporation; whereas all joint stock is capable expressly of being sold, exchanged, varied, or disposed of, at the pleasure of the corporate body." [1]

SEC. 128. The interest of the shareholder, and the character and quality of his interest, was well stated in the opinion of ROGERS, J., in a case in the supreme court of Pennsylvania. He says: "Money due on bond or note, or other contract, for the detention of chattels, or for torts, is included under the head of title to things in action. Bank shares would seem to be included in that class, as they merely entitle the holder to receive on demand a portion of the profits or earnings of the bank, and never in this country have been considered as other than chattels, giving no such interest to the holder as that of a partner in a partnership transaction. I know of no case in which the point has been directly adjudged, but in *Gilpin* v. *Howell* [2] such would seem to be the opinion of the court. In that case so far from treating stock as real estate, or as personal property in possession (as a horse, for example), it is ruled, that when one purchases stock for another, and takes a transfer on the books of the bank in his own name, it is sufficient if he retains so much of the same stock as will enable him to transfer to his principal on demand the whole amount purchased for him, and that it is not necessary that he should retain the identical scrip or shares. Although the bank shares may be said to indicate or represent the portion of interest which the shareholder has in the property of every kind belonging to the company, yet it cannot be said, with any propriety, that he is in the actual possession of the common property

[1] Blight *v.* Brent, 2 You. & C. (Ex.) 268. See, also, Durkee *v.* Stringham, 8 Wis. 1; Wordsworth on Joint-stock Companies, 288; Edwards *v.* Hall, 6 De G. M. & G. 74; 35 Eng. L. & Eq. 433; Wildman *v.* Wildman, 9 Ves. 174; Kirby *v.* Potter, 4 id. 751; Planters' Bank *v.* Merchants' Bank, 4 Ala. 753; Denton *v.* Livingston, 9 Johns. 96.

[2] 5 Barr. 57.

of the bank, any more than the owner of a bond or note is in possession of the money of which it is the representative. The only possession the holder has is the certificate, which is merely the evidence of his interest, as title deeds are of title to lands, but not of possession. That stock cannot be considered in the light of a thing in possession, and personal estate, as distinguished from a *chose in action*, would also appear from this, that at common law it could not be taken in execution and sold for debt."[1]

SEC. 129. According to the recognized principles of the law, personal chattels are material things capable of actual and manual possession, such as money, jewels, corn, etc. These are usually transferred on a sale by actual delivery of the material thing. But a chose in action is a right of action merely; as money due on a note or other contract or damages for a wrong.[2] The learned Chief-Justice SHAW has clearly illustrated this distinction of personal property, into chattels and merely choses in action, in the following language: "According to the modern decisions courts of law recognize the assignment of a *chose in action*, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor and recover a judgment for his own benefit. But in order to constitute such an assignment two things must concur: first, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and secondly, the transfer shall be of the whole or entire debt or obligation, in which the chose in action consists, and, as far as practicable, place the assignee in the place of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable. The transfer of a *chose in action* bears an analogy, in some respects, to the transfer of personal property; there can be no manual extradition of a *chose in action*, as there must be of

[1] Slaymaker *v.* Gettysburgh Bank, 10 Barr. 373. See, also, Humble *v.* Mitchell, 11 A. & E. 205; Duncuft *v.* Albrecht, 12 Sim. 189; Hargreaves *v.* Parsons, 13 M. & W. 561.

[2] 2 Kent's Com. 285; Long on Sales, 2.

personal property to constitute a lien; but there must be that which is similar, a delivery of the note, certificate, or other document, if there is any, which constitutes the chose in action, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it, on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in the place of the assignor as the owner.",[1]

SEC. 130. **Character and quality of certificates.**—Certificates of stock are not securities for money, nor are they, as we have seen, possessed of the qualities of commercial obligations, and, therefore, subject to the rules and principles of the law merchant, relating to negotiable notes or bills of exchange.[2] They are merely the muniments of title, and evidence of the holder's right and title to given shares in the property and franchises of the corporation, of which such shares constitute him a member.[3] But the delivery of the certificates with a proper assignment of the same, on a sale thereof, usually renders the sale complete.[4]

They are in the nature of a *chose in action.*

Like a note or bill of exchange they may be transferred by assignment and delivery, subject only to such reasonable rules as may be prescribed therefor by the corporation, for mutual advantage and protection; the assignee being substituted thereby in the place of the assignor and entitled to all his rights and privileges, conferred by the certificate. The assignee, however, must take the certificate subject to all the equities, which the corporation may have against the same. But the holder may transfer his interest to a purchaser, though the transfer be not made, as required by the rules or by-laws of the corporation.[5]

[1] Palmer v. Merrill, 6 Cush. 282.

[2] Mechanics' Bank v. New York, etc., R. Co., 3 Kern. 600; New York, etc., R. Co. v. Schuyler, 3 E. P. Smith (17 N. Y), 592.

[3] Mechanics' Bank v. New York, etc., R. Co., 3 Kern. 627; New York, etc., R. Co. v. Schuyler, 17 N. Y. 592. See, also, Hutchins v. State Bank, 12 Metc. 421; Slaymaker v. Gettysburgh Bank, 10 Barr. 373.

[4] Howe v. Starkweather, 17 Mass. 243; Sargeant v. Franklin Ins. Co., 8 Pick. 98; United States v. Vaughan, 3 Binn. 394; Munn v. Barnum, 24 Barb. 283; Noyes v. Spaulding, 27 Vt. 420; Orr v. Bigelow, 20 Barb. 21.

[5] Gilbert v. Manchester Iron Man. Co., 11 Wend. 627; Quiner v. Marblehead Social Ins. Co., 10 Mass. 476; Sargent v. Essex Marine R. Co., 9 Pick. 202.

And where the charter requires a transfer on the books of the cor-

In such cases the assignee takes the stock subject to all equities of the corporation and of every other person.[1]

In the case of *Shaw* v. *Spencer*,[2] FOSTER, J., observes: "It is clear that a certificate of stock transferred in blank is not a negotiable instrument. Each of these certificates is expressed on its face to be transferable only on the books of the company by the holder thereof, in person, or by a conveyance in writing recorded in said books, and a surrender of this certificate. No commercial usage can give such an instrument the attributes of negotiable paper. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name, must fill out the blanks, as they were filled in the present instance, so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares."

SEC. 131. **Transfer of shares; how made.** — We have already alluded to the right of the holder of shares of capital stock to sell and transfer the same, as any other personal property may be sold and transferred, and shown that any restraint upon such right would be unconstitutional and void.[3] But it is usually provided by the articles of association or by-laws, that transfers of shares of stock shall be recorded on the proper books of the company, kept for that purpose. And where a deed of settlement of a banking company provided that no person should be entitled to become a transferee of a share, unless he was approved by the directors, it was held that they must exercise their power reasonably.[4] And the better opinion now seems to be, that clauses in the acts of, or articles of incorporation, providing that stock shall only be transferred on the books of the company, are only for the security of the corporation, and do not prevent the

poration, it is under no obligation to permit a transfer to be made by a person claiming to be an assignee, where the assignment and power of attorney is executed to some person in *blank*. Dunn *v.* Commercial Bank, 11 Barb. 580. See, also, Gilbert *v.* Manchester Iron Co., 11 Wend. 627.

[1] Stebbins *v.* Phœnix Fire Ins. Co., 3 Paige, 350; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; New York R. Co. *v.* Schuyler, 34 id. 30.

[2] Greenwood *v.* Lake Shore R. Co., 10 Gray, 373.

[3] See *ante*, § 110; see, also, *post*, § 134 *et seq.*

[4] Robinson *v.* Chartered Bank, L. R., 1 Eq. 32.

title from passing, as between the assignor to the assignee of the stock.[1] But in such a case, a purchaser without a transfer on the books of the company acquires only the equitable rights of the assignor;[2] and the assignee would take the transfer of the same, subject to the obligations of the assignor to the company and all liens which they may have on the stock, and all rights of the company to any assessments thereon, and all equities of the corporation or any other person.[3]

A power to regulate the transfer of stock by the corporation is sufficient to authorize a by-law that the stock shall only be transferable at the bank of the corporation and on its books; and in that case, until such transfer the purchaser could take only an equitable title, subject to any claims, or liens of the corporation, by virtue of its charter or by-laws, or by valid usage or agreement.[4] In New York, where a stockholder of a corporation transferred his stock in good faith, but did not cause the the transfer to be made upon the books of the company, as required by the statute of incorporation; and the company had no transfer book; and the certificate of the transfer required to be filed in the town clerk's office, was not signed by the officers of the company as required by its by-laws, but was recorded by the direction of the company, who acquiesced in the same and recognized the transferee as the owner of the stock, it was held that the original stockholder was not liable to pay calls upon the stock after the transfer.[5] But in Massachusetts, it has been held that shares in a bank, whose charter provides that they shall "be transferable only at its banking-house and on its books," cannot be effectually transferred (as against a creditor of

[1] Per GOLDWAITHE, J., in Duke *v.* Cahawba Nav. Co., 10 Ala. 82. See, also, Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120; Chouteau Spring Co. *v.* Harris, 20 Mo. 382; Bargate *v.* Shortridge, 5 H. L. Cas. 297, 31 Eng. L. & Eq. 44; Eames *v.* Wheeler, 19 Pick. 442; Stone *v.* Hackett, 12 Gray, 227.

[2] Mount Holly Turnp. Co. *v.* Ferree, 17 N. J. Eq. 117.

[3] Gilbert *v.* Manchester Iron Manuf. Co., 11 Wend. 627; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599; New York, etc., R. Co. *v.* Schuyler, 34 id. 30; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41.

[4] Id. See, also, Lockwood *v.* Mechanics' National Bank, 9 R. I. 308, where the doctrine is maintained. See, also, as to the validity of the custom of the transfer in such cases by the secretary, Chambersburgh Ins. Co. *v.* Smith, 11 Pa. St. 120. As to what constitutes a legal transfer of corporate stock as against one having a prior equity, and as to who is a *bona fide* holder of stock, see Weaver *v.* Barden, 49 N. Y. 286.

[5] Isham *v.* Buckingham, 49 N. Y. 216.

the vendor who attaches them without notice of any transfer), by a delivery of the certificates thereof, and a blank power of attorney from the vendor to the vendee, to transfer the same on the books of the company, even if notice of such transfer be given to the bank before the attachment is executed.[1]

Mr. Brice observes: "The capital stock is usually divided into portions styled shares. Such shares may be of one description only, being of one and the same amount, and conferring on all holders thereof the same rights, privileges and liabilities; or they may be of various classes and with various denominations, the possessors of shares of one class having rights and being under liabilities differing widely from those belonging to the shares of other classes.[2]

SEC. 132. The practice of transferring such shares by delivery of the certificates with a blank assignment and power of attorney is sanctioned by the authorities;[3] and the purchaser acquires a perfect title thereto as against the former holder, from whom he receives it. As against the corporation he has a right of action against the corporation for its value if they refuse to transfer it on a demand being made therefor; but if they have a lien upon the same, then the purchaser takes it subject to such lien. But the certificate of stock of a corporation has *none* of the qualities of commercial or negotiable instruments, and as a general rule, the purchaser acquires no better title than the assignor had.[3] And it has been held that if it is transferred merely by delivery, with the blank assignment and power of attorney above referred to, but without any transfer on the proper books of the company, where such is required, a subsequent *bona fide* purchaser from the assignor in whose name it stands upon the books, a transfer made on such books, with the permission of the company, to such

[1] Fisher *v.* Essex Bank, 5 Gray, 373.

[2] Green's Brice's Ultra Vires, 141.

[3] Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; Weaver *v.* Barden, 3 Lans. 338; S. C., 49 N. Y. 286; Mechanics' Bank *v.* New York, etc., R. Co., 13 id. 599; Dunn *v.* Commercial Bank, 11 Barb. 580; McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325; S. C., 55 Barb. 50; Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 270; Broadway Bank *v.* McElrath, 2 Beas. (N. J.) 24; Mt. Holly, etc., T. Co. *v.* Ferree, 2 C. E. Green, 117.

subsequent purchaser, cuts off all rights and equities of the holder of the stock certificates to the stock itself.[1]

SEC. 133. The shares of capital stock are now regarded as personal property;[2] and dividends when made on such shares should be made on all the stock, so that each holder shall receive his proportionate share; and directors have no authority to declare a dividend on any other principle.[3]

In reference to certificates of stock and their character and quality the supreme court of the United States say: "Stock certificates of all kinds have been construed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable."[4]

SEC. 134. **Refusal of the corporation to transfer on its books.**—Where the provisions of the statute, articles of association, or by-laws, require that a transfer of the certificates of stock should be made or recorded on the books of the company, a refusal of the company, or officer, or agent, having charge of such books, to make the requisite entry or record of a transfer on proper application, and the furnishing of the necessary evidence for this purpose, without a good reason therefor, would render the corporation liable for all damages sustained by reason of such refusal.

And a certificate of stock in a corporation, with a power of attorney authorizing the transfer of the stock to any person, is *prima facie* evidence of equitable ownership in the holder, and

[1] See *ante*, § 110; Ang. & Am. on Corp. (10th ed.), §§ 534, 535 and notes.

[2] Gilpin *v.* Howell, 5 Pa. St. 41; Slaymaker *v.* Gettysburgh Bank, 10 id. 373; Waltham *v.* Waltham, 10 Metc. 334; Hutchins *v.* State Bank, 12 id. 421; Wheelock *v.* Moulton, 15 Vt. 519; Isham *v.* Bennington Iron Works Co., 19 id. 230; Arnold *v.* Ruggles, 1 R. I. 165; Denton *v.* Livingston, 9 Johns. 96; Johns *v.* Johns, 1 Ohio St. 350; State *v.* Franklin Bank, 10 id. 91; Heart *v.* State Bank, 2 Dev. Eq. 111; Planters', etc., Bank *v.* Leavens, 4 Ala. 753; Union Bank *v.* State, 9 Yerg. 440; Brightwell *v.* Mallory, 10 id. 196.

[3] Jones *v.* Terre Haute, etc., R. Co., 29 Barb. 353; S. C., 57 N. Y. 196; Ryder *v.* Alton, etc., R. Co., 13 Ill. 516; Atlantic, etc., R. Co. *v.* Commonwealth, 3 Brewst. 366; State *v.* Baltimore, etc., R. Co., 6 Gill, 363; Luling *v.* Atlantic Mut. Ins. Co., 45 Barb. 510.

[4] Bank *v.* Lanier, 11 Wall. 369. See, also, Leitch *v.* Wells, 48 N. Y. 585; Salisbury Mills *v.* Townsend, 109 Mass. 115.

renders the stock transferable by the delivery of the certificate; and in such a case, when the party, in whose hands the certificate is found, is shown to be the holder for value, and without notice of any intervening equity, his title as owner cannot be impeached.[1] And if the corporation has no secretary or clerk, and the president has charge of its books, a right to have a transfer exists, and the demand therefor may be made on the president. And where the charter of a corporation provides that shares shall be transferable, in the manner prescribed by the by-laws of the corporation, and no by-laws are made, but the certificates recite that the stock is transferable only on the books of the company, on surrender of the certificate, the officers of the company and not the assignee of the stock should transfer the stock on the books.[2]

Although certificates of stock do not possess the qualities of commercial or negotiable paper and even a *bona fide* assignee will take them subject to all the equities which existed against the assignor;[3] still, unless the right to transfer on the books of the company should be prohibited by the contract of subscription, or the constating instruments, the corporation could not refuse to permit such transfer; and in case of such refusal, the corporation would be liable for all damages sustained thereby. In a recent case where an action was brought against a bank to recover damages for its refusal to permit a transfer of shares of stock on its books, the facts were that two certificates had been issued to one Culver; that these certificates stated on their face, that the stock was transferable on the books of the bank, only, and on the surrender of the certificates; that this limitation was in accordance with the provisions of a by-law; that Culver pledged said stock to the bank as security, giving it a power of attorney authorizing it to sell the same; that under this power, fifty shares were sold by the bank; that Culver was allowed to retain the two certificates of said shares; that he sold the shares and assigned the certificates, and gave the usual power to the assignee (Lanner), authorizing him to transfer the stocks on the

[1] Mount Holly Turnp. Co. *v.* Ferree, 17 N. J. Eq. 117.

[2] Green Mt. Turnp. Co. *v.* Bulla, 45 Ind. 1.

[3] See *ante*, § 127 *et seq.*; New York R. Co. *v.* Schuyler, 17 N. Y. 592; Anderson *v.* Nicholas, 28 id. 600; New York R. Co. *v.* Schuyler, 34 id. 30.

books of the bank; and that the assignee bought the stock in good faith. The supreme court of the United States, on these facts, held that the assignee was entitled to recover.[1]

In relation to such certificates they say: "Although neither in form or character negotiable paper, they approximate to it as near as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates assigned with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."[2]

SEC. 135. **Contracts for the transfer of shares.** — Where an owner of shares contracts to convey or transfer the same at a future time, on certain conditions, the same rules would be applicable as in other contracts relating to personal property. But in case of a

[1] Bank *v.* Lanier, 11 Wall. 369.

[2] Id. Where a trustee under a will had a certificate issued to him as trustee, and he was afterward removed from his office as trustee, and the court removing him ordered the master in chancery to assign the trust property to a new trustee, which was done, and the corporation issued a new certificate to the new trustee, and the plaintiff in good faith, having no notice of the proceedings, lent money to a holder of the old certificates, which had a transfer on it signed in blank by the old trustee, and he filled up the blank and demanded a transfer to him and a new certificate, it was held that he could not maintain an action against the corporation. A curious case was recently determined in the United States circuit court (Mass.), by SHEPLEY, J., in which it appeared, that a party borrowed money of a bank and gave as collateral security a certificate of stock in his name, which he had fraudulently altered from two to two hundred shares. The loan was repaid and the bank returned the certificate, which had a transfer on it in blank, signed in blank by the cashier.

The holder then again borrowed money of the plaintiff, and gave the same certificate, thus indorsed to him, as collateral security. The court held that the bank, by indorsing the certificate, warranted the genuineness of it. Mathews *v.* Massachusetts Bank, 9 Am. L. Rev. 164.

contract to transfer, where the party so contracting, at the time, has not such shares, but expects to purchase the same at some future time in the market, for the purpose of carrying out his contract, it has been the subject of contrary judicial opinions whether such contracts were legal. It was intimated, at least, by Lord TENTERDEN, in *Ryan* v. *Lewis*,[1] that such contracts were illegal. But this is not "regarded, at this time, as sound law, however good sense or good morality it may seem to be."[2] Contracts of this character are now regarded as valid, and can be enforced by action.[3]

SEC. 136. **Liens of the corporation on stock.** — It may be observed that the company would not, in the absence of some express provision of the law of its constitution or other lawful regulations, have any lien on the shares of its stockholders for amounts due thereon, or other indebtedness to the company; but it is usually provided, in such law or regulations, that it shall have such lien for any balance on such stock which may be due or will become due thereon to the corporation.[4] The stockholders of the corporation and assignees of stock would be bound to take notice of such a provision. The rights of the corporation in this re-

[1] Ry. & M. 386.

[2] 1 Redf. on Rail., §§ 33-4.

[3] On this question, ISHAM, J., in Noyes *v.* Spalding, 27 Vt. 420, observes: "Contracts for the sale of stock of this character on time are valid at common law, and can be enforced by action. The statute 7 Geo. 2, c. 8, made perpetual by 10 Geo. 2, c. 8, has rendered some contracts of that character illegal. They are rendered void, so far as the public stocks of that country are concerned, when the seller had no stock at the time of making the contract, and none that was ever intended to be transferred by the parties, but their intention was to pay the difference merely that may exist between the market value of the stock at the time of the transfer, and the price agreed to be paid. Such contracts are rendered void by that statute, and are treated as wagering contracts; the seller virtually betting that the stock will fall, the buyer that it will rise. Chitty on Bills, 112, note *w*. It has been held that railroad stock is not within the act. Hewitt *v.* Price, 4 M. & G. 355; S. C., 3 Railw. C. 175; Fisher *v.* Price, 11 Beav. 194. In the case of Mortimer *v.* McCallan, 6 M. & W. 70, Lord ABINGER observed 'that the act was made for the purpose of preventing what is declared to be illegal trafficking in the funds by selling fictitious stock merely by way of differences; but it was never intended to affect *bona fide* sales of stock.' Elsworth *v.* Cole, 2 M. & W. 31; 2 Kent's Com. 468, note *b*. In the case of Grizebood *v.* Blane, 20 Eng. L. & Eq. 290, it was held that a tolerable contract for the sale of railroad shares, where no transfer is intended, but merely 'differences,' amounting to the rise or fall of the market, is gaming within the 8 and 9 Vict., c. 109, § 18; S. C., 11 Com. Bench, 538."

[4] Massachusetts Iron Co. *v.* Hooper, 7 Cush. 183; Heart *v.* State Bank, 2 Dev. Ch. 111; Sargent *v.* Franklin Ins. Co., 8 Pick. 90.

spect, as we have seen, is usually secured by a provision of its by-laws or articles of association, requiring a transfer of the stock to be made on the books of the company, in order to be valid, at least, as between the owners and the company.[1] Such a provision is perhaps usually intended to secure the corporation any sum due to it by the stockholder, but this, as we have noticed, does not prevent a transfer of the legal rights or equitable interests of the holder.[2] It has been held that a lien on shares held by the company, by virtue of such provisions, extends to and embraces dividends;[3] although it has also been held, in this country, that such a provision, giving a bank a lien upon the stock of a shareholder for debts due the bank, does not, by implication, give a lien upon dividends accruing after the death of the shareholder.[4] And a corporation, by assenting to an assignment made by a stockholder, for the benefit of all his creditors, "with no other preference than is or may be authorized by law," does not lose its lawful lien on the stock for debts due by the assignor to the corporation.[5]

SEC. 137. Where a company has a lien on the stock standing upon its books in the name of a judgment debtor, and such stock is sold under an execution against the debtor, there is no obligation of the company to transfer the same to the purchaser, except upon the payment by the latter of the amount secured by the lien.[6] So, where there was a provision in the charter declaring stock personal property, and authorizing the board of directors to make rules and regulations concerning the transfer of it, subject to the general law of the state, and the board of directors adopted a rule prohibiting the transfer of stock until all the debts due by the owner of the same to the corporation was paid, this was held to be valid, although inconsistent with a general law of the state relating to the transfer of property, and that a transfer contrary to such a rule, although good against the assignor, would

[1] Fisher *v.* Essex Bank, 5 Gray, 373; Northrop *v.* Newtown Turnpike Co., 3 Conn. 544; Ang. & Am. on Corp., § 354 and note.

[2] See *ante*, § —; also, Marlborough Manuf. Co. *v.* Smith, 2 Conn. 579; Same *v.* Same, 5 id. 246; Farmers' Bank *v.* Iglehart, 6 Gill, 50; Stebbins *v.* Phœnix Ins. Co., 3 Paige, 350; Union Bank *v.* Laird, 2 Wheat. 390; Black *v.* Zacharie, 3 How. 513; Arnold *v.* Suffolk Bank, 27 Barb. 424.

[3] Hague *v.* Dandeson, 2 Exch. 741.

[4] Brent *v.* Bank, 2 Cranch (C. C.), 517.

[5] Dobbins *v.* Walton, 37 Ga. 614.

[6] Newberry *v.* Detroit, etc., R. Co., 17 Mich. 141.

not be good as against the corporation, for either a debt due or to become due from him, either as principal or surety.[1] But, where a person, owning shares in a bank, transferred them to another, and the bank issued a new certificate to the transferee, making the shares in the new certificates "transferable after the holder pays all his liabilities to said bank," this was held to be a waiver of the lien of the bank upon the shares thus transferred, for amounts due or to become due from the assignor.[2] And, where a corporation had by its charter a lien upon the shares of a stockholder for a debt due to it, and the stockholder caused his stock to be transferred on the books of the company, which was the only manner in which it could be transferred, to a fictitious name, which was known to the officers of the corporation, and the original owner afterward caused the stock to be transferred to another person, by a person who claimed or was represented to be the holder, as security for an antecedent debt due from the original owner to him, but no money was paid on the transfer, it was held that the lien of the corporation upon the stock for a debt due from the original owner was not lost by said transfers.[3]

SEC. 138. The plaintiff, being the assignee for value of a certificate of stock in a bank, which stock stood in the name of his assignor, demanded a transfer to himself, which was refused on the ground that the assignor had not paid his original subscription. The plaintiff brought his action for damages for the refusal, and it was held that the bank had a right, by virtue of its by-laws, to refuse a transfer while the original owner was indebted to the bank.[4] And where the articles of association of a bank provided that no stockholder should be permitted to transfer his shares, or receive a dividend thereon, until his indebtedness to the bank was paid, and authority was given to the bank, in case any sum was past due and owing to it, to sell the stock of the owner to pay the same, these two provisions were held to create a lien upon the stock in favor of the bank, for the holder's indebt-

[1] St. Louis Rep. Ins. Co. v. Goodfellow, 9 Mo. 149.

[2] Hill v. Pine River Bank, 45 N. H. 300.

[3] Stebbins v. Phœnix Fire Ins. Co., 8 Paige, 350.

[4] McCready v. Rumsey, 6 Duer, 574.

edness to the bank.[1] But where a stockholder died insolvent and indebted to the corporation, and subsequently the directors passed a resolution prohibiting the transfer of stock by any debtor of the company until the debt should be paid or secured, and afterward the administratrix of the stockholders sold the stock to a person who was ignorant of the indebtedness and the resolution, without which a right of sale and transfer existed in the owner, it was held that the corporation had no right to refuse to transfer the stock on its books to the purchaser.[2]

SEC. 139. **Corporations may be compelled to allow a transfer.**— Where a purchaser or assignee of stock is entitled to a transfer of the stock on the books of the company, he could undoubtedly compel the corporation to have the same so made by the proper officer, by mandamus. And where, by the charter or rules and regulations of the corporation, the transfer is thus required to be made, an assignment of certificates of stock would, as we have seen, be good as between the assignor and assignee, and the company could only claim the benefit of the lien for debts due from the assignor. If the claims against him are satisfied, then the assignee may compel the transfer on its records.[3] If the corporation demands of the stockholder more than is due, the holder must tender the amount actually due, to put the corporation in the wrong, and enable him to compel the transfer.[4] But, in the absence of fraud or collusion on the part of the company, a mere transfer of stock on the books thereof, by direction of the vendor to his vendee, does not make the company liable as a guarantor of the vendor's title to the stock.[5] And, unless some specific mode of transfer is required, any transfer of stock entitles the

[1] Arnold v. Suffolk Bank, 27 Barb. 424.

[2] Steamship Dock Co. v. Heron, 52 Pa. St. 280. See, also, Weston v. Bear River, etc., Mining Co., 5 Cal. 186.

Transfers not entered upon the books of the company are, under the California statute, good against all the world except subsequent purchasers in good faith, without notice. People v. Elmore, 35 Cal. 653; Naglee v. Pacific Wharf Co., 20 id. 529.

But the assignee cannot maintain an action for a refusal of the corporation, if the assignor has not paid for the stock. McCready v. Rumsey, 6 Duer, 574.

[3] Weston v. Bear River Mining Co., 5 Cal. 186. An action will lie against a corporation for a refusal to transfer stock upon its books, if it is its duty so to do. Commercial Bank v. Kortright, 22 Wend. 348.

[4] Pierson v. Bank of Washington, 3 Cranch (C. C.), 363.

[5] Central R. Co. v. Ward, 37 Ga. 515.

transferee to vote at all meetings of the corporate body, and for directors of the company.[1]

SEC. 140. **When assigned stock is subject to execution against the assignor.**— Under the California statute (1852), a transfer of the certificates of stock, though conveying the interest of the owner, was held not to be a valid transfer against a *bona fide* purchaser without notice, who purchased the same at a sale on execution against the assignor, unless there was also a transfer of the stock on the books of the company, as provided by the statutes.[2] So, in Maine, it has been held that under the statute of that state, providing for a transfer of stock on the proper books of the corporation,[3] no transfer of the capital stock of a bank will secure it from attachment, against a recorded owner.[4]

SEC. 141. **Stockholder's right of action against a corporation.**—We have already referred to the right of a member to sue a corporation, in a case where, under the same circumstances, he could maintain an action against a natural person. And this right, in particular cases, we will now proceed to illustrate. Thus, a stockholder of a corporation may maintain a bill against the corporation to restrain it from paying a tax illegally assessed upon the property of the company, the state treasurer, seeking to collect the tax, being made a party defendant, and enjoined from collecting the same.[5]

A refusal by the directors of a bank to commence a suit to test the legality of a tax upon the property of the bank is not a breach of their duty for which a bill will lie against them at the suit of a stockholder.[6] But any dissenting stockholder may

[1] People *v.* Devin, 17 Ill. 84.

[2] Naglee *v.* Pacific Wharf Co., 20 Cal. 529.

[3] Rev. Stat. Me., ch. 46, § 11.

[4] Skowhegan Bank *v.* Cutler, 49 Me. 315. See, also, Bank *v.* Lanier, 11 Wall. 369. The question as to whether the sale and transfer of stock is complete so as to defeat the rights of creditors to the same, is made in some cases to depend upon the provisions of the statutes relating to the same; as for instance whether such transfer is entered on the proper books of the company as required by law. Pinkerton *v.* Manchester & L. R. Co., 42 N. H. 424. See, also, Fisher *v.* Essex Bank, 5 Gray, 373; Sabin *v.* Woodstock, 21 Vt. 362; Pittsburgh & C. R. Co. *v.* Clarke, 29 Pa. St. 146. But see Broadway Bank *v.* McElrath, 2 Beas. 24. As to the transfer of equitable interests, and the time from which the transfer dates, see Rice *v.* Courtis, 32 Vt. 460; 1 Story's Eq. Jur. 400, *b.* "A corporation has no implied lien upon stock for the liabilities of the stockholders to the company." 1 Redf. on Rail., § 33, par. 5; citing Mass. Iron Co. *v.* Hooper, 7 Cush. 183; Heart *v.* State Bank, 2 Dev. Ch. 111; Sargent *v.* Franklin Ins., Co. 8 Pick. 90.

[5] Mechanics', etc., Bank *v.* Debolt, 18 How. 380; Dodge *v.* Wolsey, id. 331; Mechanics' Bank *v.* Thomas, id. 384.

[6] Id.

restrain the company from executing a contract which exceeds its power.[1] And it is well settled that a private corporation may be sued by one of its own members, either at law or in equity, under special circumstances; as where it attempts to do acts which it is not warranted in doing by its charter, it may be restrained by injunction.[2] So, any member of a corporation has a right of action against the corporate body for any injury he sustains from the wrongful acts of its agents or officers.[3] So, a minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and the other stockholders against the officers, for conspiracy and fraud, whereby their interests will be or have been sacrificed.[4] And in order to constitute an illegal application of the funds or money of the corporation it is not necessary that there should be any intentional wrong or actual fraud; and to give the court jurisdiction in equity in such a case, the plaintiff need not allege or prove any such actual and willful fraud or collusion on the part of the company or the directors thereof.[5] A bill in equity will also lie to compel the delivery of stock to one who has already an equitable title to such stock, although a suit at law might also be maintained therefor.[6]

SEC. 142. An injunction against a corporation will be granted on the application of a single stockholder when he can show that the corporation is employing the corporate powers and funds to accomplish purposes not within the scope of the objects of the institution.[7] But no corporation, or tax payer, individually, or on behalf of himself or others, can sue for an injury to, or misapplication of, the corporate property or franchises, except in cases of fraud, corruption, or a violation of law on the part of the functionaries intrusted with the corporate powers and duties.[8] A stockholder may, however, have relief by injunction against a corporation of which he is a member, which is about to use the funds of the company for a different purpose entirely from that which was

[1] Zabriskie v. Cleveland, etc., R. Co., 23 How. 381.

[2] *Ex parte* Booker, 18 Ark. 338.

[3] Gray v. Portland Bank, 3 Mass. 385. See, also, Waring v. Catawba Co., 2 Bay (S. C.), 109.

[4] Peabody v. Flint, 6 Allen, 52.

[5] Hill v. New Jersey R. Co., 10 N. J. Eq. 171.

[6] Hill v. Rockingham Bank, 4 N. H. 567.

[7] Gifford v. New Jersey R. Co., 10 N. J. Eq. 171.

[8] Arkenburgh v. Wood, 23 Barb. 360.

designed by the act of incorporation.[1] And where a corporation, of which the plaintiff was a member, obtained permission from the legislature to extend their railroad beyond the terminus named in the original charter, and accepted said act granting said extension by a majority vote, against the wishes of the plaintiff, who was a stockholder, it was held that this was a fundamental change in the purposes for which the corporation was organized, which could not be binding upon the individual corporators without their consent, and that the plaintiff was entitled to have an injunction against the appropriation by the defendant (the corporation) of the funds or credits of the corporation, toward the construction of the proposed extension of the road.[2] And it has also been held that if an individual stockholder has suffered damage in a contract with a corporation through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation; and that he cannot maintain an action against the directors, who are themselves liable to the corporation.[3] But a minority of the stockholders in a corporation have a remedy in chancery against the directors, and against the corporation and all others, whether individuals or corporations, assisting or confederating with them, to prevent such corporation and the directors thereof from making any misapplication of their capital or profits, which might result in lessening the dividends of the stockholders or the value of their shares, if the acts intended to be done constitute in law a breach of trust or duty.[4] The general rule, however, is that the suit against a ministerial officer or agent, to account, or for misconduct, must be brought in the name of the corporation; and that it cannot be maintained in the name of an individual stockholder.[5] But, if justice cannot otherwise be obtained, or where the directors, officers and managers, having the control of the corporation and its affairs, are guilty of misconduct that amounts to a breach of trust, it will be permitted to sue them.[6]

[1] Baltimore, etc., R. Co. v. Wheeling, 13 Gratt. (Va.) 40.

[2] Stevens v. Rutland R. Co., 29 Vt. 545. See, also, Bliss v. Anderson, 31 Ala. 612; Neall v. Hill, 16 Cal. 145. But, in Connecticut, it has been held that an individual stockholder cannot maintain an action at law against the directors of a corporation for mismanaging its affairs or defrauding the corporation. Allen v. Curtis, 26 Conn. 456.

[3] Smith v. Poor, 40 Me. 415.

[4] March v. Eastern, etc., R. Co., 40 N. H. 548. See, also, Gardiner v. Pollard, 10 Bosw. 674; Vanderbilt v. Garrison, 5 Duer, 689.

[5] Brown v. Vandyke, 8 N. J. Eq. 795.

[6] Id.

SEC. 143. **Liability of the stockholders in equity to creditors.** — In equity, the property of a corporation is regarded as held in trust for the payment of its debts, and creditors may pursue it into the hands of any person, not a *bona fide* holder. And it is also well settled that the stockholders of a corporation are not entitled to any share of the capital stock or dividends of the profits, until all the debts are paid. Therefore, a sale of the capital stock of a corporation and a division of the proceeds among the stockholders will not defeat the rights of creditors; but they may compel such stockholders to contribute *pro rata* to the payment of the corporate debts out of the money so received.[1] This doctrine was recently affirmed in the supreme court of the United States. Mr. Justice CLIFFORD, in delivering the opinion of the court, observed: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever's possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all the debts of the corporation are paid. Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold; and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company, and the division of the proceeds of the sale among the stockholders, will not defeat the trust, nor impair the remedy of the creditors, if any debts remain unpaid; as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders and compel each one, to the extent of the fund, to contribute *pro rata* toward the payment of their debts out of the money so received and in their hands.

"Valid contracts made by a corporation survive even its dissolution by a voluntary surrender or sale of its corporate franchises,

[1] See *post*, ch. 14. A creditor of the corporation cannot maintain an action against the directors for damages on the ground that their misconduct has caused the insolvency of the corporation. Winter *v.* Baker, 34 How. Pr 183; 50 Barb. 435.

and the creditors of the corporation, notwithstanding such surrender and sale, may still enforce their claims against the property of the corporation, as if no such surrender had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company, are assets of the corporation, and, as such, constitute a fund for the payment of its debts; and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than *bona fide* creditors or purchasers, leaving any debts of the corporation unpaid, the rule in equity is, that such holders take the fund charged with trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts.[1]

"Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of the creditors and stockholders, and all others interested in its pecuniary affairs; and any one receiving any portion of the fund by voluntary transfer, or without consideration, may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that respect, the same relation to the former as that sustained by the corporation."[2]

SEC. 144. **Over-issued, and "watered stock."** — The constating instruments, in this country, generally limit the capital stock of corporations for pecuniary profit, and fix the number of shares into which the same shall be divided. In other cases, and particularly under special charters, corporations, in this respect, are only limited by the circumstances of the case, and may issue stock and increase the capital to any extent required to carry out the purposes and objects of the enterprise.

[1] Story's Eq. Jur., § 1252; Mumma v. Potomac Co., 8 Pet. 286; Wood v. Dummer, 3 Mason, 308; Vose v. Grant, 15 Mass. 522; Spear v. Grant, 16 id 14; Curran v. Arkansas, 15 How. 307.

[2] The Chicago, etc., R. Co. v. Howard, 7 Wall. 392.

An over-issue of stock certificates generally operates to reduce the value, in such cases, of the original stock legitimately issued to existing stockholders, and such stock is usually issued by the directors or other managers and agents, for selfish and fraudulent purposes, and is a fraud upon such existing stockholders as do not authorize it. The stock thus affected is frequently, by a figure of speech, called "watered stock."

A variety of decisions have been rendered, in reference to such over-issued stock and the obligations of the corporation therefor. On the one hand it has been claimed that as such over-issue was the act of the directors or other agents of the corporation, and that although in excess of their authority or of the authority of the corporation, still as the corporation select its agents, when they act within the apparent scope of their authority, the corporation should be liable, as the corporation furnish such agents with the means of imposing on innocent parties, and therefore it should be bound by such acts of its agents.[1]

And it has been further maintained that, although such fraudulent over-issue of stock, or a contract made by agents therefor, imposed no obligation upon the corporation, in respect to it, still, the corporation would be responsible, for the fraud of the agents in issuing such spurious stock, and for all damages sustained thereby by the purchaser; and that his remedy for the tort would be as effectual and afford him as complete indemnity as if the contract had been binding on the part of the corporation.[2]

On the other hand it has been held that such issue of stock on the part of the corporation or its agents, in excess of the limitations of the constating instruments, is ultra vires and void; that parties dealing with such agents are bound to take notice of such limitations in the fundamental law of the corporation;[3] that if the company has authority to act in a matter and appoints an agent for the purpose, but the agent fraudulently exceeds his authority, the person dealing with the agent in relation to stock can claim no advantage therefrom, or against the corporation, if

[1] Mechanics' Bank v. New York & N. H. R. Co., 4 Duer, 480.

[2] New York & N. H. R. Co. v. Schuyler, 38 Barb. 534; Shotwell v. Mali, id. 445; Cazeaux v. Mali, 25 id. 578.

[3] 2 Redf. on Rail., § 234, par. 70 and note.

he has knowledge of the fraudulent acts of the agent, or if he acts in bad faith in the transaction; and that a *bona fide* purchaser from him would be in no better situation.

This is illustrated by a recent case in New York,[1] where the facts were as follows: By the act creating a corporation, its capital stock was limited to $3,000,000, and divided into shares of $100 each, transferable in such a manner as the company should direct; the entire stock was taken, and certificates issued therefor to the owners. The by-laws of the company prescribed that transfers of stock should only be made on the transfer books of the company, and required the certificate of ownership to be surrendered prior to the making of such transfer and the issue of a new certificate. The company established a transfer agency, and appointed their president a transfer agent, who was authorized and accustomed to the transfer of stock on the books in his charge, and on the surrender of the certificate therefor, to execute and deliver to the transferee the usual certificate, stating that he was entitled to the number of shares of stock specified therein, transferable on the books of the company by him or his attorney, on the surrender of the certificate. The agent fraudulently gave to one Kyle a certificate in the usual form for eighty-five shares of stock, when, in fact, the latter owned no stock, none stood on the books in his name, and no certificate for such stock had been surrendered. The plaintiffs in good faith, and relying upon the certificate as regularly issued and valid, made a loan to Kyle, receiving from him as security the certificate, with an assignment of the stock and a power of attorney to transfer the same. In an action by the plaintiffs against the corporation for refusing to permit the stock represented by the certificate to be transferred, it was held by the court of appeals of that state, that the certificate was void, and that the plaintiffs did not thereby acquire a right, legal or equitable, to any stock; that the corporation was not responsible to the plaintiffs for damages sustained by their reliance upon the genuineness of the certificate; that the certificate did not partake of the character of negotiable instruments; that a *bona fide* assignee of such an instrument takes it subject to the equities

[1] Mechanics' Bank *v.* New York & N. H. R. Co., 13 N. Y. 599.

which exist against the assignor; and that the doctrine of estoppel *in pais* was not applicable to such a case.[1]

On this subject Mr. Redfield appropriately observes: "Whatever may be said of the duty of corporations to employ only reliable directors and transfer agents, and of the justice of the company being bound by their acts, within the apparent scope of their employment, all of which are in general terms most undeniable propositions; still, something is due to common prudence and reasonable caution, on the part of those who deal in stocks, to see at least what the charter and books of the company will at once disclose to any one who will examine. And if, instead of making a reasonable examination of matters obviously within his reach, one sits down blindly to adventure millions upon a spurious issue of stock in such sums and at such times as to induce most prudent men to hesitate about its genuineness, it is perhaps not unreasonable that he should be held bound by such facts as the slightest examination must have disclosed. This is the rule in regard to most commercial and business transactions, and we see no special hardship in its application here within reasonable limits."[2]

[1] See, also, Chicago City R. Co. *v.* Allerton, 18 Wall. 233; New York & N. H. R. Co. *v.* Schuyler, 34 N. Y. 30; Curran *v.* Arkansas, 15 How. 304; Curry *v.* Scott, 54 Pa. St. 270; Ernest *v.* Nicholls, 6 H. L. C. 401. But see Greenwood's case, 23 E. L. & E. 422; S. C., 3 De G., M. & G. 471; Athenæum Ass. Co. *v.* Poley, 1 Giff. 102; S. C., 31 Law T. 70.

[2] 2 Redf. on Rail., § 234, 11.

CHAPTER VI.

DIRECTORS.

SEC. 145. **Election of.** — As corporations are artificial and merely ideal persons, they cannot, as before observed, act in all respects like a natural person, or perform any physical act. Hence the necessity of their acting, as a general thing, by duly constituted agents. So it can only express its assent through the voice or votes of its members; the voice or votes of the ma-

jority, if fairly expressed, or an opportunity for a fair expression is given, at any regular corporate meeting, is considered the voice and will of the corporate body.

As the body of a private corporation is usually composed of many members, and the meeting of them, for the purpose of obtaining an expression of its will, would, in the management of most of its business affairs, be inconvenient, if not impracticable, it is usual with joint-stock corporations to confer the authority in this respect upon a limited number of the members usually called directors or managers, who act, in most respects, in the general management of its affairs, as agents for and in place of the corporation, and of the stockholders.[1] Provision is usually made by the act, articles of incorporation, or other constating instrument, as to the mode of electing or appointing such directors; but in the absence of such a provision, it is evident, on general principles, that the corporators would possess such power. However appointed, they are, in some respects, trustees of the corporation as well as of its members, and even of its creditors. But we shall hereafter refer to this subject.[2]

SEC. 146. **Powers of directors.** — The powers of directors are usually such as are conferred upon them by the constating instruments or by-laws of the body. But, as a general rule, they possess no powers beyond those residing in the corporate body. And if they should exceed the powers conferred upon them, or perform acts exceeding their authority, they would be ultra vires and void. But of the doctrine of ultra vires we propose to treat in another place.[3]

They are the agents of the corporation so far as authorized, either expressly or impliedly, by the fundamental law of its being. But they do not possess powers not conferred upon it in this manner, or such as come within the usual powers of such agents by the common law. It has been held that the authority to act as directors will be liberally construed in their favor, and with a due consideration for the best interests of the company.[4]

[1] Dana v. Bank of United States, 5 W. & S. 247; Burke v. Smith, 16 Wall. 395.

[2] See *post*, ch. 14.

[3] See *post*, ch. 9.

[4] Green's Brice's Ultra Vires, 41; Wilson v. Meiers, 10 C. B. (N. S.) 348; 8 L. T. (N. S.) 780.

Thus, in a case where the directors had authority to sell the ships of the company, it was held that they might sell all its ships.[1] And where the general powers of the body of the corporation are transferred to the properly constituted directors, they may, unless restricted, do whatever the corporation might; and by virtue of this power they may dispose of the corporate property in whole or in part; but this general power is held not to extend to its franchises, and unless they are expressly authorized by law so to do, they would not possess the power to dispose of them.[2]

SEC. 147. Where, by the law of its constitution, the corporation has authority to sell and transfer its property or franchises, or to consolidate with any other company, this authority could be exercised by the directors by virtue of their express or implied powers.[3] But a sale and transfer of the rights of one company to another, without legislative authority, is held to be against public policy, and courts will not aid a transfer against such policy, or in disregard of the duties and obligations of the company.[4] And it seems well settled that no corporation can, without express legislative authority, either sell or mortgage its franchises.[5] But we will reserve the further consideration of this subject for another place.[6]

[1] Wilson v. Meiers, 10 C. B. (N. S.) 348.

[2] Wood v. Belford, etc., R. Co., 8 Phil. 94; Middlesex R. Co. v. Boston, etc., R. Co., 115 Mass. 347; Enfield Toll Bridge Co. v. Connecticut, etc., R. Co., 7 Conn. 29; Abbot v. Hard Rubber Co., 33 Barb. 587; Fisher v. Evansville, 7 Ind. 407; State v. Bailey, 16 id. 46; Bruffett v. Great Western R. Co., 25 Ill. 353; Hatcher v. Toledo, etc., R. Co., 42 id. 447; Mahaska, etc., R. Co. v. Des Moines, etc., R. Co., 28 Ia. 437.

[3] Treadwell v. Salisbury Manf. Co., 7 Gray, 393; Lauman v. Lebanon, etc., R. Co., 30 Pa. St. 42; New Orleans, etc., R. Co. v. Harris, 27 Miss. 517. See, also, Black v. Delaware, etc., R. Co., 9 C. E. Green, 455, where it is held that in case of a lease or sale by virtue of legislative authority, unless provision is made for compensation to such stockholders as dissent, they may prevent it. But see *post*, ch. 16.

[4] Hayes v. Ottaway, etc., R. Co., 61 Ill. 422.

[5] York, etc., R. Co. v. Winans, 17 How. 39; Pullan v. Cincinnati, etc., R. Co., 4 Biss. 35; Pierce v. Emery, 32 N. H. 484; Commonwealth v. Smith, 10 Allen, 448; Richardson v. Sibley, 11 id. 65; Hendee v. Pinkerton, 14 id. 381; Troy, etc., R. Co. v. Kerr, 17 Barb. 601; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42; Wenchester T. Co. v. Vimont, 5 B. Monr. 1; Arthur v. Commercial Bank, 9 S. & M. 394; Coe v. Columbus, etc., R. Co., 10 Ohio St. 372. But compare Shepley v. Augusta, etc., R. Co., 55 Me. 395; Kennebec, etc., R. Co. v. Portland, etc., R. Co., 59 id. 9; Miller v. Rutland, etc., R. Co., 36 Vt. 452; Hall v. Sulivan R. Co., 2 Redf. Am. R. Cases, 621.

[6] See *post*, ch. 10. For the subject of consolidation, see *post*, ch. 16.

SEC. 148. A provision in a bank charter, conferring upon the directors power to make such by-laws, rules and regulations as shall be needful, touching "the time, manner and terms upon which discounts and deposits shall be made," will be construed as giving to the directors power to make by-laws, etc., to operate and control merely the internal conduct of the bank, and to restrain and direct its own officers in the management of its affairs, and not to affect the public at large or prejudice the rights and interests of third persons.[1] But where a charter provided that the capital stock "may be increased from time to time at the pleasure of said corporation," it was held that the directors alone had no power to increase it, although it was further provided that "all the corporate powers shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint." It was further held that such powers referred to ordinary business transactions.[2]

SEC. 149. **Board of directors or managers.** — We have said that it is usually provided by the fundamental or constatory regulations of the body, for the election of directors and the exercise of their powers and duties. In such cases these regulations must ordinarily be considered in the light of a power of attorney; and the general principles applicable to agency would be applicable to a board composed of such directors. Where their powers are specifically defined by such instruments, they would be thereby limited, and could not claim, in respect to the powers thus regulated, to have the common-law powers of such a body. To hold otherwise would be, in the language of Mr. Justice STORY, "to suppose that the common law is superior to legislative authority; and that the legislature cannot dispense with forms, or confer authorities which the common law attaches to general corporations."[3]

SEC. 150. The general powers conferred upon the board of directors gives them control of the property of the corporation;[4] but the board would have no power, by an act or resolution, to

[1] Seneca County Bank v. Lamb, 26 Barb. 595.

[2] Railway Co. v. Allerton, 18 Wall. 233.

[3] Fleckner v. Bank of U. S., 8 Wheat. 338.

[4] See Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Smith, 2 Cow. 579.

exclude a member from any common-law or statutory rights; such as to exclude him from an examination of the bank books of the corporation, on the ground that he was hostile to its interests.[1] The powers of the directors under a general authority will, of course, depend, as we have suggested, upon the nature and character of the corporation. Thus, the board of directors of a banking corporation may authorize its agents to borrow money;[2] fix the rates and conditions of discounts;[3] pass resolutions authorizing the stockholders to transfer their stock to the bank in payment of their debts to it;[4] and authorize any one of their number to assign any securities belonging to the bank.[5]

The board of directors may, ordinarily, do any act, in the general management of the business, that the company can do, unless restrained by the creating or constating instruments, or the by-laws of the body.[6]

SEC. 150. **Implied powers of.** — It will be manifest that the powers of directors of joint-stock, as well as many other corporations, are mostly implied, or to be inferred, from grants of authority in general terms. In fact, the constitution of directors of a corporate body would carry with it, by implication, a variety of duties and powers, the details of which are seldom or never expressed in the articles or by-laws of the institution. It is difficult to lay down any universal rules relating to their powers, as they must largely depend upon the nature, character and objects of the corporation.

In general, it may be said that they possess all the powers to act, which the corporation would possess if it had no directors; unless they are restrained by some express law of the association,

[1] People v. Throop, 12 Wend. 183.

[2] Ridgeway v. Farmers' Bank, 12 S. & R. 256; Leavitt v. Yates, 1 Edw. 134.

[3] Bank of U. S. v. Dunn, 6 Pet. 51; Bank of Metropolis v. Jones, 8 id. 16; Percy v. Millaudon, 3 La. 568; Bank of Pennsylvania v. Reed, 1 W. & S. 101.

[4] Taylor v. Miami Exporting Co., 6 Ohio, 218; Bank of Columbus v. Bruce, 17 N. Y. 507.

[5] Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepoon, id. 288; Bank Commissioners v. Bank of Brest, 1 Harr. Ch. 106; Lester v. Webb, 1 Allen, 34.

[6] Whitewell v. Warner, 20 Vt. 425; Bank of Middlebury v. Rutland, etc., R. Co., 30 id. 159. See, also, Augusta Bank v. Hamblet, 35 Me. 491; Despatch Line, etc. v. Bellamy, 12 N. H. 225; Bank of Middlebury v. Edgerton, 30 Vt. 182; Miller v. Rutland, etc., R. Co., 36 id. 452; Burrill v. Nahant Bank, 2 Metc. 163; Sargent v. Webster, 13 id. 497; Hoyt v. Thompson, 19 N. Y. 207; Gordon v. Preston, 1 Watts, 388.

or from implication necessarily deduced therefrom. But they would possess no powers by implication which were not necessary for an economical and successful prosecution of the purposes of the institution, and cannot engage in any business or transactions foreign to the purposes and ordinary business of the company.[1]

SEC. 151. **Acts not within the scope of their powers.** — It would perhaps be easier to illustrate, in general, the powers of directors by a reference to the cases where it has been decided that they exceeded their powers, than by any general statement of the powers they possess. Thus, it has been held that they have no general authority to apply to the legislature for any change or enlargement of the corporate powers;[2] nor to alienate property essentially necessary for the transaction of the company's business;[3] nor to destroy the corporate existence, or give away its funds, or deprive it of its means to accomplish the purposes of its creation.[4]

On this subject, Mr. Justice STORY once observed: "Independent of some special and positive law, or provision in its charter to such an effect, I do exceedingly doubt if any corporation, at least without the express assent of all the corporators, can rightfully dispose of all its property by such a general assignment, so as to render itself incapable in the future of performing any of its corporate functions."[5] And where the organic law vests in the directors all the corporate powers, this is construed to relate to the ordinary transactions of the company and is held not to extend to a reconstruction of the corporation, or to an enlargement of its capital.[6] And it has also been held that it is an abuse of the trust of directors wholly unauthorized, and at war

[1] As to the general powers of directors unless restrained by the laws of the institution, see Whitewell *v.* Warner, 20 Vt. 425; Bank of Middlebury *v.* Rutland, etc., R. Co., 30 id. 159; Augusta Bank *v.* Hamblet, 35 Me. 491; Despatch Line, etc. *v.* Bellamy Manuf. Co., 12 N. H. 225; Bank of Middlebury *v.* Edgerton, 30 Vt. 182; Miller *v.* Rutland, etc., R. Co., 36 id. 452; Hoyt *v.* Thompson, 19 N. Y. 207; Gordon *v.* Preston, 1 Watts, 385.

[2] Marlborough Manuf. Co. *v.* Smith, 2 Conn. 579.

[3] Abbot *v.* American Hard Rubber Co., 33 Barb. 587.

[4] Burke *v.* Smith, 16 Wall. 395; Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Bedford, etc., R. Co. *v.* Bowser, 48 Pa. St. 29.

[5] Dissenting opinion of STORY, J., concurred in by Justices BALDWIN and MCLEAN, in Beaston *v.* Farmers' Bank, 12 Pet. 102.

[6] Railway Co. *v.* Allerton, 18 Wall. 233.

with the design of the charter, to single out some of the subscribers to the stock and release them from their liability.[1] Mr. Justice STRONG, on this subject, observes: "It has been settled by very numerous decisions, that the directors of a company are incompetent to release an original subscriber to its capital, or to make any arrangement with him by which the company, its creditors, or the state, shall lose any of the benefits of his subscription. Every such arrangement is regarded in equity not merely ultra vires, but as a fraud upon other stockholders, upon the public, and upon the creditors of the company."[2]

SEC. 152. **Powers conferred by the fundamental law.**—From what has already been said, it is evident that the powers of directors may not only be limited by the regulations or fundamental law of the corporation, relating especially to them, but, by the powers of the corporate body itself. If the management of its affairs are committed to them by the fundamental law of its existence, they alone have the power to manage its concerns; and may exercise their discretion without being subject to the control of the corporate body.[3] Nor have the stockholders any general right to interfere with the management of the affairs of the company by the directors, where they act in good faith, and within the scope of the general powers of the corporation. The remedy of the stockholders for mismanagement, or a lack of ability or judgment on the part of these agents, would be to make a change of them at a proper meeting, held for that purpose, which is generally provided for, by the laws of the institution. In this way, a change of management and of the business policy may be effected, to suit the interests or the wishes of a majority of the members.

On the subject of the exclusiveness of the authority of the directors of a corporation, and their exemption from any interference on the part of the stockholders, and their right to control and manage the corporate affairs, within the scope of the authority conferred upon them, it was recently observed: "It might well be doubted whether a general meeting of the stockholders of

[1] Bedford R. Co. v. Bowser, 48 Pa. St. 29.

[2] Burke v. Smith, 16 Wall. 395. See, also, Alford v. Miller, 32 Conn. 543; Bank v. St. John, 25 Ala. (N. S.) 566; Jones v. Terre Haute, etc., R. Co., 57 N. Y. 196. See, also, Howe v. Deuel, 43 Barb. 508.

[3] Bank of the U. S. v. Dandridge, 12 Wheat. 118.

the plaintiff [the corporation] could be legally held for any other purpose than the selection of a board of directors. Such a meeting as to any other purpose or object could only be in its purpose and character advisory to the board of directors. It would have no power to take under its charge or put under the charge of others the affairs of the company. The president and directors of such a corporation as the plaintiff have been said to be the agents of the stockholders; but this expression must be understood in view of, and must be limited to, the subject under consideration. In any thing like a general or universal sense, it will be readily seen that it cannot be true. Indeed, so far as third persons and especially the government or creating power of the corporation, are concerned, the president and the directors, and the stockholders may rather be considered as the members and limbs, each acting within its appropriate sphere, of that artificial being or entity, to which the name and powers of the corporation have been assigned by the law of its creation. When, therefore, a question arises, by whom the conferred powers are to be exercised, it will be determined rather by the law of the creation of the company, showing in each case on whom the governing or controlling power has been conferred, that by any consideration of the rights and interests of those concerned in the corporation as among themselves."[1]

SEC. 153. **Powers depend upon interpretation.**—The powers of directors must frequently depend upon the construction of the fun-

[1] Opinion by GHOLSON, J., in Dayton, etc., R. Co. *v.* Hatch, 1 Disn. 84 See, also, Whitewell, Bond & Co. *v.* Warner, 20 Vt. 425; Commissioners *v.* Trustees, etc., 6 S. & R. 508; Ridgway *v.* Farmers' Bank, 12 id. 256; Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. Sel. Cas. 180; State *v.* Bank of Louisiana, 6 La. 745; Salem Bank *v.* Gloucester Bank, 17 Mass. 29, where it is held that, if the general power of making by-laws is left by the charter to the corporation at large, the power of the board of directors may be circumscribed by them.

In Conro *v.* Port Henry Iron Co., *supra*, a lease was made by the stockholders instead of the directors, and the charter provided for a board of directors of the corporation with general powers; the court say: "It is quite obvious from the charter, that the company could do no act except through the directors. When the charter prescribes the mode of its action, its injunctions must be rigidly pursued. * * * The stockholders in this case had no power to make a lease or do any other administrative act in the management of the affairs of the corporation. If a case could be made at all, it could be executed only in pursuance of an act of the directors, who are appointed by the charter for the management of its affairs. It is no answer that individual stockholders, who were present at the meeting when the lease was ordered, were also directors. They did not meet or act as directors, but as stockholders."

damental law of the corporation, and the questions most frequently presented to the courts are those relating to the law creating and constituting boards of directors, and the proper construction and interpretation of the charter, articles of association, by-laws, or constating instruments of the corporation.

SEC. 154. **Powers not conferred on directors remain in the corporate body.** — As the directors of a corporation are, at least in one sense, agents of the corporation, and receive their powers from their appointment and the constating instruments, whatever power, in reference to the management of its affairs, does not, by virtue of these, vest in them, must reside in the whole body; and it has been held that in emergencies, where the charter failed to prescribe the mode of procedure so as to accomplish the objects of the corporation, the stockholders have a right to act and exercise whatever power is necessary to carry out the purposes of the company and preserve its corporate existence.[1]

SEC. 155. **The directors cannot change the character or objects of the corporation.** — The directors, by virtue of the power they possess, cannot change the entire character or purposes of a corporation. Any attempt of this character would be ultra vires, of which all parties interested would be required to take notice. Such authority is not involved in a general power to manage its business, and could only be exercised with the consent of each stockholder, or at least upon full satisfaction and compensation being made to such as may dissent.[2] No majority, however large, have a right to divert the joint capital to any purpose not consistent with the objects of the corporation.[3] And any fundamental change or alteration of the charter in respect to the original objects and purposes for which the corporation was created, cannot be obligatory on any member who objects; and increasing the capital stock of a corporation by a board of directors beyond the limits fixed by the charter would be ultra vires. If the power to change the capital is expressly given to the corporation, it must be exercised by the stockholders, and not by the directors. On

[1] *In re* Wheeler, 2 Abb. Pr. (N. S.) 361.

[2] Zabriskie *v.* Hackensack, etc., R. Co., 3 C. E. Green, 178.

[3] Kean *v.* Johnson, 1 Stockt. 401; Black *v.* Delaware, etc., R. Co., 7 C. E. Green, 130; 9 id. 455.

this question the supreme court of the United States say: "A change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter, cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a construction of the body itself, or to an enlargement of its capital stock. * * * Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious. First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust. Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it, they could perpetuate their own power. Their own agency does not extend to such an act, unless so expressed in the charter or subsequent enabling act, and such subsequent act would not bind the stockholders without their consent or assent to it in some form."[1]

But, where authority in this respect is expressly conferred upon the directors by the general law of its constitution, or to be inferred from the charter or general acts of the legislature in existence at the time of the creation of the corporation, the directors would possess the requisite power to accept an amendment of the charter. And amendments of the charter, not in violation of its objects, may be accepted by the shareholders, but the trustees or

[1] Railway Co. v. Allerton, 18 Wall. 233. See, also, Marlborough Man. Co. v. Smith, 2 Conn. 579.

directors have no powers in this respect except such as may be conferred upon them; and where it is apparent that this authority is by law vested in the directors, they could, undoubtedly, accept an amendment of the original charter or act of incorporation; for instance, an amendment authorizing a subscription in real estate to be received by the company.[1]

On this subject TURNER, L. J., observes: "The great undertaking of these (*i. e.*, railway and similar) companies could not be carried out by private enterprise, and parliament has, therefore, with a view to public good, authorized the constitution of large bodies, acting by directors, for the purpose of carrying them out. But these bodies have no existence independent of the acts which create them, and they are created by parliament with special and limited powers, and for limited purposes. Whether parliament has wisely limited their powers for the purposes of their incorporation is not for us to consider. The fact of their being endued with such powers, and incorporated for such purposes, only shows that parliament did not think fit to intrust them with more extended powers, or to incorporate them for other purposes."[2]

SEC. 156. **Directors as agents.** — The general subject of the agency of officers will be reserved for the following chapter, and only a brief reference to the subject, as it relates to directors, will be here given.

It is evident that the directors of a corporation, in whatever manner constituted, are the agents of the corporation, and, within the scope of the authority conferred by the laws or regulations of the company relating to them, their acts are the acts of the company. The general principles in fact of the law of agency are applicable to the relations between the company and its directors. But they are agents only so far as they have authority, by virtue of powers conferred, and of this authority and the extent or limit of it, parties dealing with these or other agents of the corporation

[1] Dayton, etc., R. Co. *v.* Hatch, 1 Disn. 84; State *v.* Adams, 44 Mo. 570.

[2] Shrewsbury, etc., R. Co. *v.* London, etc., R. Co., 22 L. J. Ch. 682. On the doctrine of ultra vires in such cases, see Salomons *v.* Laing, 12 Beav. 339; East Anglican, etc., R. Co. *v.* Eastern, etc., R. Co., 11 C. B. 775; South Yorkshire R. Co. *v.* Great N. R. Co., 9 Ex. 55; 22 L. J. Ex. 304; Green's Brice's Ultra Vires, 28 *et seq.*

would be required to take notice. These are open to public inspection, and constitute the power of attorney, and instructions to these agents, accessible to all parties dealing with them.[1]

SEC. 157. The familiar doctrine in such cases is, that although the party dealing with an agent is not required to take notice of private instructions communicated to him from the principal, in reference to his agency, he is required to take notice of a written authority and power of attorney, which he should know, from the circumstances of the case or the character of the agency, must exist. And where there is a special authority to do a particular act, or a general authority to do all acts relating to a particular matter, the agent may use all the necessary and appropriate means to carry out the purposes of the agency; and any person dealing with such an agent may rely upon the acts of such an agent, in executing the authority thus conferred, as obligatory upon his principal.[2] All persons dealing with the agents of a corporation must be supposed to know the provisions of the fundamental laws or constating instruments of the corporation, and of the limitations therein contained relating to the authority of its agents, as these laws are usually accessible to all persons. But where agents act within the apparent scope of the authority conferred upon them, it will be presumed that their acts were authorized by the body they represent.[3]

It has, however, been held that the doctrine that authority to make a contract, by an agent acting for an individual, will be

[1] Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381; Bank of Augusta *v.* Earle, 13 Pet. 587; Pearce *v.* M. & I. R. Co., 21 How. 441.

[2] Story on Agency, § 73.

[3] Bissell *v.* Michigan Southern, etc., R. Co., 22 N. Y. 258. In this case, SELDON, J., observes: "There are, in England, a class of corporations organized under general laws, which do not provide the manner in which the objects and purposes of the corporation are to be effected, but leave this to be arranged by a deed of settlement between the corporators themselves. By this deed the companies prescribe and limit the powers and functions of their various officers, so far as they are left uncontrolled by the statute and the general laws of the kingdom. Now, it is plain that there is no analogy between an act which merely transcends the limits of this deed of settlement, and one which violates the provisions of this organic act. The deed of settlement is the private act of the shareholders, and its provisions have respect solely to their private interests. It is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved, when the question is, whether the officers have exceeded their authority."

implied from former employment of the same agent for the same purposes, has no application where the person assumes to act as agent for a corporation.[1] The reason of this distinction is, that in the first case the extent of the authority is generally known only between the principal and agent, but in the latter the authority is created by statute, or is a matter of record, to which all may have access who have occasion to deal with its officers.[2]

SEC. 158. In Massachusetts a distinction has been made between the provisions of the charter in relation to the authority of directors and other officers, which parties are bound to know, and of by-laws, of which actual notice it is claimed should be brought home to the parties dealing with the agents.[3] This doctrine is based upon the distinction, that in the one case the means of knowledge is open and public, while in the other, it is private. This would, however, we apprehend, be limited to those cases where the by-laws were adopted by the board of directors. But in this country organizations are generally formed under general statutes, by signing articles or certificates of association, etc., and these may provide for, and prescribe the duties of, officers and agents, and thereby such regulations would become a part of its organic law. In some cases, however, the general doctrine seems to have been maintained, that parties dealing with an agent would be bound even to take notice of the limitations of his authority contained in the by-laws, as being matters of record, and subject to examination by those dealing with the corporation.[4]

SEC. 159. **Rule in England as to the authority of directors.** — The English doctrine in reference to the authority of directors is, "that persons dealing with a registered company are bound to acquaint themselves with the limits imposed by the deed of settlement or articles of association, on the authority of the directors; yet, strangers to the company, dealing with directors, cannot be

[1] Wyman v. Hallowell, 14 Mass. 58.

[2] Salem Bank v. Gloucester Bank, 17 Mass. 1. See, also, State v. Commercial Bank of Manchester, 6 Sm. & M. 237.

[3] Fay v. Noble, 12 Cush. 1.

[4] Adriance v Roome, 52 Barb. 399; Wild v. Bank of Passamaquoddy, 3 Mason, 505; State v. Commercial Bank, 6 S. & M. 218; Risley v. Indiana, etc., R. Co., 1 Hun, 202; North River Bank v. Aymar, 3 Hill, 262; Mechanics' Bank v. New York, etc., R. Co., 13 N. Y. 599; McCullough v. Moss, 5 Denio, 567; Dabney v. Stevens, 40 How. Pr. 341; Salem Bank v. Gloucester Bank, 17 Mass. 1; Lowell Savings Bank v. Winchester, 8 Allen, 109.

affected by by-laws, which may, under the articles, be from time to time made and varied by the directors, unless notice of such by-laws is proved."[1]

SEC. 160. **Delegation of their authority.** — The general principles of the laws of agency in respect to the delegation of the authority of the agent are applicable to the agents of corporations. Mr. Story on this subject says: "One who has a bare power or authority from another to do an act must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger whose ability and integrity might not be known to the principal, or who, if known, might not be selected by him."[2] And it has been held in reference to the powers of directors as agents, that where power is conferred upon them involving the exercise of personal judgment and discretion, they cannot, without some express authority for that purpose, delegate this authority to another person.

In a case in New Hampshire, involving the question, the court say: "According to the uniform current of authorities, it would seem quite clear that an agent cannot delegate to another any portion of his power requiring the exercise of discretion or judgment, unless in the power conferred upon the agent is involved the power of substitution by the agent, in express terms, or at least by necessary implication. But no such power of substitution was conferred upon the directors in the present case. The by-laws to be sure allowed 'the exercise of a general superintendence and control by the directors, or a majority of them, over the affairs of the corporation.' But this did not include the right to confer authority upon others to exercise the same power. Here was clearly no express power of substitution given to the directors, and there was nothing in the nature of the authority to be exercised which could render the aid of others necessary. No power of substitution is, therefore, to be implied."[3]

[1] Buckley, p. 427. See, also, Ernest v. Nicholls, 6 H. L. C. 401; Fountaine v. Carmarthen R. Co., L. R., 5 Eq. 316; Royal Bank of India's Case, L. R., 4 Ch. 252. Provisions of the charter and by-laws are sometimes deemed directory only only. Bank of U. S. v. Dandridge, 12 Wheat. 64; United States v. Kirkpatrick, 9 id. 720; Same v. Van Zandt, 11 id. 184.

[2] Story on Agency, § 13.

[3] Gillis v. Baily, 21 N. H. 149. See, also, *Re* Leeds Banking, 65 (Howard's Case), L. R., 1 Ch. App. 563.

But the question whether the authority conferred and delegated calls for the exercise of such judgment or discretion, as comes within the general rule in such cases, or is a merely ministerial act, is frequently one that is difficult to determine. And in Massachusetts it was held that: "A board of directors of the banks of Massachusetts is a body recognized by law. By the by-laws of these corporations, and by a usage so general and uniform as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a delegated authority, in the sense in which the rule applies to agents and attorneys, who exercise the powers especially conferred upon them and no others. We think, therefore, that a board of directors may delegate authority to a committee of their own number, to alienate or mortgage real estate." [1]

SEC. 161. The charter or organic laws of the corporation usually confer the exclusive power of managing its affairs upon a board of directors. This, however, does not constitute it the corporation, and their acts evidenced by their votes, as shown by the record, are as complete authority to all its agents as if the appointment were by deed or other written instrument and authenticated by the corporate seal.[2]

SEC. 162. **Ratification of directors' acts.**—It is a familiar principle of the law of agency, that the principal may ratify an unauthorized act of an agent. This principle is also applicable to corporations and their agents.

This ratification may be by a direct and express sanction of it, or by such action and conduct on its part, as to authorize the pre-

[1] Burrill *v.* Nahant Bank, 2 Metc. 163. See, also, Percy *v.* Millaudon, 3 La. 568; Western Bank *v.* Gilstrap, 45 Mo. 419; Commissioners *v.* Bank of Buffalo, 6 Paige, 497. Directors have authority to empower one of their number to assign any securities belonging to the company. Stevens *v.* Hill, 29 Me. 133; Spear *v.* Ladd, 11 Mass. 94; Northampton Bank *v.* Pepoon, id. 288. And where directors have authority to appoint agents their authority does not necessarily cease with the termination of the authority of the board appointing them. Anderson *v.* Langden, 1 Wheat. 85; Exeter Bank *v.* Rogers, 7 N. H. 33; Brown *v.* County of Somersett, 11 Mass. 221; Thompson *v.* Young, 2 Ohio, 334.

[2] Bank of the U. S. *v.* Dandridge, 12 Wheat. 64; Fleckner *v.* Bank of the U. S., 8 id. 338.

sumption that it has accepted or ratified the agent's acts.[1] But if the act done by the agent is entirely beyond any authority of the corporation to perform, it would be ultra vires, and generally void.[2]

SEC. 163. **Implied ratification.** — The ratification of the acts of an agent is, however, generally inferred from the acts of the corporation and the circumstances of the case. If the board of directors, or other agents on behalf of the corporation, make a contract and the corporation receives the benefits of such contract without objection, it would ordinarily be treated as a ratification of it, and the contract of the corporation.[3]

Thus, where the directors of a railroad company allowed the president to purchase locomotives, and give bills in payment therefor, and they were used on the road of the company for more than three years, during the management thereof by the president, who had authority from the directors to manage the same in his discretion, and the directors afterward resumed the management, this acquiescence was held to be such a ratification as to be evidence of authority in the president to bind the company for the payment of the bills issued by the president in payment for such locomotives.[4] And in another case where a corporation allowed its officers to give notes for property, where the

[1] Lowell's Case; *Re* New Zealand Banking Co., L. R., 3 Ch. 131.

[2] Peterson *v.* Mayor, etc., 17 N. Y. 449; Dill. on Corp., §§ 385, 386. Ratification may be by express assent or conduct of the principal, inconsistent with any other supposition than that he intended to adopt and own the act done in his name. Story on Agency, §§ 239, 252. But no amount of ratification can give validity to an act prohibited by law. Martin *v.* Zellerbach, 38 Cal. 300.

[3] On the subject of ratification of unauthorized acts of agents, see Trott *v.* Warren, 2 Fairf. 227; Episcopal Charitable Soc. *v.* Episcopal Church, 1 Pick. 372; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Randall *v.* Van Vechten, 19 Johns. 60; Gooday *v.* The Colchester, etc., R. Co., 15 Eng. L. & E. 596; Magill *v.* Kauffman, 4 S. & R. 317; The Proprietors, etc. *v.* Gordon, 1 Pick. 297; Ang. & Am. on Corp., §§ 239, 240; Bank of the U. S. *v.* Dandridge, 12 Wheat. 89; Union Bank of Maryland *v.* Ridgely, 1 Harr. & G. 392; Barrington *v.* The Bank of Washington, 14 S. & R. 421; Wild *v.* Passamaquoddy, 3 Mason (C. C.), 505; Smith *v.* Governor, etc., Bank of Scotland, 1 Dow. (Parl.) 27; Perkins *v.* Washington Ins. Co., 4 Cow. 645; Troy, etc., R. Co. *v.* McChesney, 21 Wend. 296; Warren *v.* Ocean Co., 16 Me. 439; Badger *v.* Bank of Cumberland, 26 id. 428; Davidson *v.* Bridgeport, 8 Conn. 472; Alabama Bank *v.* Chester, 6 Humph. 458; Hall *v.* Carey, 5 Ga. 239; Litchfield Iron Co. *v.* Bennett, 7 Cow. 234; Clark *v.* Benton Manuf. Co., 15 Wend. 256; Lohman *v.* New York, etc., R. Co., 2 Sandf. 39; City of Detroit *v.* Jackson, 1 Doug. (Mich.) 106; Bank of the State *v.* Comegys, 12 Ala. 772.

[4] Olcott *v.* Tioga Railway Co., 27 N. Y. 546.

right to do so was doubtful, still the property having been taken possession of by the corporation, who used the same for legitimate corporate purposes, this was held to be a ratification of the acts of the officers.[1]

SEC. 164. Where an insurance company, whose capital was fixed by its charter, which, however, gave authority to the stockholders to increase the stock to a certain amount, and the directors issued the additional amount without a formal or lawful vote of the stockholders, but they had received dividends upon the basis of the additional stock, having knowledge thereof, it was held to constitute a complete ratification of the issue.

In this case, DILLON, J., observes: "It is our opinion that the original charter of the company contemplated that any increase of the capital stock beyond $1,000,000 should be assented to by the stockholders as distinguished from the directors. It being admitted that the shares of stock owned by the defendant were no part of the $1,000,000 first issued, but were part of the stock issued by it in excess of the $1,000,000, and prior to the amended charter of March 25, 1869, this stock would not be legal, and no action could be maintained to recover the price of it, unless the stock had become legal stock by matters subsequently occurring, or unless the defendant, under the facts proved, is estopped to set up this objection. The legislature authorized a capital of $5,000,000, but required the assent of the stockholders to any increase beyond one million. The amount issued at no time had reached the $5,000,000. No mode of procuring the assent of the

[1] Moss v. Averell, 10 N. Y. 449. See, also, Corning v. Southland, 8 Hill, 552; Moss v. Rossie Lead Co., 5 id. 137; Conro v. Port Henry Iron Co., 12 Barb. 27; Clark's Ex'rs v. Van Riemsdyk, 9 Cranch, 158; Church v. Sterling, 16 Conn. 388; Chicago Building Soc. v. Crowell, 65 Ill. 453; Williams v. St. George's Harbor Co., 2 De G. & J. 547; Edwards v. Kilkenny, etc., R. Co., 26 L. J. C. P. 224; Phosphate of Lime Co. v. Green, L. R., 7 C. P. 43; Athenæum Life Assurance Co. v. Pooley, 3 De G. & J. 294; L. J. Ch. 119.

Whatever may be authorized by a corporation to be done may be ratified when done by an agent in excess of, or without authority. McLaughlin v. Detroit, etc., R. Co., 8 Mich. 100.

Ratification of the unauthorized acts of the president, where he executed a mortgage purporting to be on corporate property, individually, and sealed it with his private seal without special authority, may be presumed from the knowledge of the members of the board of directors, and their long continued acquiescence. Sherman v. Fitch, 98 Mass. 59; Lyndenborough Glass Co. v. Massachusetts Glass Co., 111 id. 315; Brown v. Winnissimmet Co., 11 Allen, 326; Krider v. Western College, 31 Ia. 547.

stockholders to the increase of stock is prescribed by the charter. It is conceded that in a meeting of the stockholders of the original million of stock, duly convened, a majority might determine upon such increase and bind the minority. On January 9th, 1868, the directors resolved upon an increase of the capital stock to five millions of dollars. On November 6th, 1868, the defendant subscribed for his stock. On the 13th of January, 1869, there was a regular annual meeting of the stockholders, to which a report was made, showing that $3,000,000 of stock had up to that time been issued, and $3,116,000 of stock was voted at that meeting for directors. The evidence shows that over $800,000, or, in round numbers, four-fifths of the first million of stockholders, were present in person or by proxy, and voted at this meeting for directors. No objection then or ever was made to the increase of stock, and the old stockholders and the new voted indiscriminately, and the proceeds of all sales of stock were treated and invested by the directors as capital until the company ceased to do business. Two dividends were made in 1869, and one in 1870, upon all the stock, which in each of those years exceeded four millions of dollars. The defendant in February, 1870, received two of these dividends. On the 25th of March, 1869, the charter was amended, authorizing *inter alia*, the directors to increase the stock.

After this, as well as before, the directors repeatedly and always recognized the validity of all the stock which had been issued. The defendant, it may be admitted, had no personal knowledge of any increase of capital stock, or of the passage of the amended charter, until after this suit was brought, although the agent who acted for him in his absence in respect to his stock had such knowledge. * * * From the proof in this case we find that at least four-fifths of the original million of stockholders did know of and assent, as early as January, 1869, to this increase of stock, and are of the opinion that the requisite assent of the stockholders can be shown by their conduct and acquiescence, and need not be established by any formal vote or resolution."[1]

[1] Payson v. Stoever, 2 Dill. (C. C.) 427. See, also, New Hope, etc., Co. v. Phenix Bank, 3 N. Y. 156; Salem Bank v. Gloucester Bank, 17 Mass. 1.

SEC. 165. **Effect of knowledge of unauthorized acts.** — It is a well-settled rule of the law of agency, that where the agent exceeds his authority, but the principal, with knowledge of the fact, neglects to promptly disavow the act, it is a ratification of what has been done, and is equivalent to an original authority to the agent; and this rule is as applicable in case a corporation is the principal as in other cases.[1] And where the president of a railroad company established and advertised tariffs or rates of fare and freight on the railroad, and the corporation received and appropriated the rates thus established without objection, this was held to be a ratification of the acts of the president, and equivalent to an original authority.[2]

SEC. 166. A recent case in California illustrates the doctrine of ratification of the acts of an agent by the directors. The president of a ditching company, who was its general managing agent, purchased, in the name of the company, a house for the purpose of using it for offices and the meetings of the company, and also as a boarding-house for its laborers; and executed a mortgage for the purchase-money in its name, sealed with the corporate seal. As agent of the company, he took possession of it, and it was used several times for the meetings of its directors and for other corporate purposes. About six weeks after its purchase, a resolution was offered at a meeting of the directors, declaring the contract of purchase legal and valid, but it failed to be adopted. Subsequently, the house was consumed by fire, and a suit was brought against the company to recover the balance of the purchase-money. The court say: "The authority of Nixon [the president] to make the contract, as the agent of the company, we think sufficiently appears, and if this point were doubtful, the

[1] Kelsey *v.* National Bank, 69 Pa. St. 426; Bredin *v.* Dubarry, 14 S. & R. 30; Gordon *v.* Preston, 1 Watts, 387; Bank of Penn. *v.* Reed, 1 W. & S. 101; Christian University *v.* Jordan, 29 Mo. 68.

[2] Hilliard *v.* Goold, 34 N. H. 230; Pennsylvania, etc., Co. *v.* Dandridge, 8 G. & J. 248.

But ratification will not be presumed unless the directors or trustees had full knowledge of the act. Dedham Savings Institute *v.* Slack, 6 Cush. 408.

And an officer or agent cannot ratify his own act and thereby bind the principal. Hotchin *v.* Kent, 8 Mich. 526.

If the principal enjoys the benefit of the agent's acts, it would not constitute a ratification unless it was done with a knowledge of the character of them. Yellow Jacket Min. Co. *v.* Stevenson, 5 Nev. 224.

acts of the company amounted to a ratification. Nixon, as agent of the defendants, entered into possession immediately after the purchase; the trustees held their meeting in the house, nothing is said as to his want of authority till some six weeks afterward, when, at a meeting held on the premises, the resolution approving the contract was offered and rejected. The entry of this resolution comes in a very questionable shape, and is entitled to but little weight, * * * and is, at least, a very singular mode of repudiating a contract. It would have been more in accordance with correct notions of propriety and justice if a resolution refusing to accept the contract had been passed, accompanied by an offer to cancel the deed, which had not been recorded, and a return of the property of which they were in possession."[1]

SEC. 167. **Effect of ratification.** — The general doctrine in reference to the unauthorized acts of agents is, that the ratification is equivalent to original authority to act in the matter which has been ratified. If a corporation ratify the unauthorized act of its agent, the ratification is equivalent to a previous authority, as in case of natural persons. No maxim is better settled, in reason and law, than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur;* at all events, when it does not prejudice the rights of strangers."[2]

And this doctrine is equally applicable to the directors as to other agents of a corporation.

[1] Shaver v. The Bear River, etc., Co, 10 Cal. 396.

[2] Fleckner v. United States Bank, 8 Wheat. 363; Essex T. Corp. v. Collins, 8 Mass. 299; Hayden v. Middlesex T. Corp., 10 id. 403; Salem Bank v. Gloucester Bank, 17 id. 28; White v. Westport Cotton Man. Co., 1 Pick. 220; Bulkley v. Derby Fishing Co., 2 Conn. 252; White v. Same, id. 260; Hoyt v. Thompson, 19 N. Y. 207; Peterson v. Mayor of New York, 17 id. 449; Baker v. Cotter, 45 Me. 236; Church v. Sterling, 16 Conn. 388; Bank of Pennsylvania v. Reed, 1 W. & S. 101; Hayward v. Pilgrim Society, 21 Pick. 270; Despatch Line of Packets v. Bellamy Man. Co., 12 N. H. 205; Planters' Bank v. Sharp, 4 S. & M. 75; Burrill v. Nahant Bank, 2 Metc. 167; Fox v. Northern Liberties, 3 W. & S. 108; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Cas. 267; New Hope Bridge Co. v. Phœnix Bank, 8 Comst. 156; Everett v. United States, 6 Port. (Ala.) 166; Medomak Bank v. Curtis, 24 Me. 38; Whitewell v. Warner, 20 Vt. 425; City of Detroit v. Jackson, 1 Doug. (Mich.) 106; Merchants' Bank v. Central Bank, 1 Kelly, 428; Hoyt v. Bridgewater, etc., Co., 2 Halst. Ch. 253; Stuart v. London R. Co., 15 Beav. 513; 10 Eng. L. & Eq. 57; Maclae v. Sutherland, 3 E. & B. 1; 25 Eng. L. & Eq. 92; Reuter v. Electric Tel. Co., 6 E. & B. 341; 37 Eng. L. & Eq. 189; Emmet v. Reed, 4 Seld. 312. See, also, Baker v. Cotter, 45 Me. 236; Walworth Co. Bank v. Farmers' L. & T. Co., 16 Wis. 629

The ratification operates as though the authority to do the act had previously existed. But the intervening rights of third parties cannot be affected by the subsequent ratification.[1]

SEC. 168. **Directors under the national banking law.** — Under our national banking laws, it is provided that the associations incorporated thereunder shall have power "to elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalties thereof, dismiss such officers, or any of them, at pleasure, and appoint others to fill their places."[2]

They also provide that such a body corporate shall have power "to prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed."[3]

They further provide that such corporations shall have power "to exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion, by leaving money on personal security; and by obtaining, issuing and circulating notes."[4]

SEC. 169. **Personal liability of directors.** — We have said that the directors of a corporation are the agents of it. But as a general rule they are only required in the management of its affairs to keep within the limits of the powers conferred upon them, and to exercise good faith and honesty. They only undertake, by virtue of the duties which they assume, to perform these duties according to the best of their judgment, and with reasonable diligence; and a mere error in judgment on the part of a director,

[1] Cook v. Tullis, 18 Wall. 332; Wood v. McCain, 7 Ala. 806; Taylor v. Robinson, 14 Cal. 396; McCracken v. San Francisco, 16 id. 591.

[2] U. S. Rev. Stat., 1874, p. 999.

[3] U. S. Rev. Stat., 1874, p. 999.

[4] Id.

will not ordinarily subject him to personal liability therefor. And unless there has been some violation of the charter or the constating instruments of the company, or unless there is shown to be a want of good faith, or a willful abuse of discretion, there will be no personal liability, nor can the acts of such officers be controlled by any court at the instance of a stockholder.[1]

[1] Smith *v.* Prattville Manuf. Co., 29 Ala. 503.

In Spering's Appeal, 71 Pa. St. 11 (10 Am. R. 684), Judge SHARSWOOD observes:

"It is by no means a well-settled point what is the precise relation which directors sustain to the stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, persons who have gratuitously undertaken to perform certain duties, and who are, therefore, bound to apply ordinary skill and diligence but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to be held responsible for mistakes of judgment or want of skill and knowledge? * * * We are dealing with their responsibility to stockholders, not to outside parties, creditors and depositors.

"Upon a close examination of all the reported cases, although there are many dicta not easily reconcilable, yet I have found no judgment or decree which held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties.

"I do not mean to say by any means that their responsibility is limited to these cases; there may exist such a case of negligence or of acts clearly ultra vires, as would make perfectly honest directors personally liable. * * *

"While directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, or willful misconduct, or breach of trust, for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence, by which such fraud has been perpetuated by agents, officers or directors; yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to be absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body. * * *

"Conceding that the directors did violate the charter, it was a question upon which with all due care they might have made an honest mistake, and, moreover, it appears that they acted throughout by advice of their counsel. It is well settled that trustees will be protected from responsibility under such circumstances."

The same doctrine is maintained in Scott *v.* De Peyster, 1 Edw. Ch. 513. See, also, Gobold *v.* Mobile Bank, 11 Ala. 191; Bank *v.* St. John, 25 Ala. (N. S.) 566; Smith *v.* Prattville Manuf. Co., 29 Ala. 503; Pontchartrain R. Co. *v.* Paulding, 11 La. 41; Christ Church *v.* Barksdale, 1 Strobh. Eq. 197; Williams *v.* Gregg, 2 id. 316; Gratz *v.* Redd, 4 B. Monr. 178; Lexington R. Co. *v.* Bridges, 7 id. 559; Bayless *v.* Orne, 1 Freem. (Miss.) Ch. 174; Hodges *v.* New England Screw Co., 1 R. I. 312; Knowlton *v.* Congress Spring Co., 57 N. Y. 518; *Re* European C. R. Co., Syke's Case, L. R., 13 Eq. 255; Green's Brice's Ultra Vires, 408 *et seq.*

A cause of action against the officers

SEC. 170. Where the directors of an insurance corporation had fraudulently permitted false statements to be officially made as to the condition of the company, it was held that they were personally liable to a party who had suffered damage thereby.[1] But it has been held that a director was not liable for a representation false in fact, made in published circulars of the corporation on which his name appeared as a director, but which representation was not known to him to be false.[2]

SEC. 171. The directors are generally only bound in the management of the affairs of the corporation to use reasonable diligence and prudence, that is, to such diligence and prudence as men usually exercise in the management of their own affairs of a similar nature, and, if they act in good faith, they are not personally responsible to the stockholders for a loss that may be sustained thereby.[3] But a director may be liable, personally, in damages

of a corporation individually is assignable. Bennett v. Wheeler, 16 Abb. Pr. (N. S.) 81.

Where officers may maintain actions for contribution from other officers, see Nickerson v. Wheeler, 118 Mass. 295.

[1] Salmon v. Richardson, 30 Conn. 360; Calhoun v. Richardson, id. 229; Peek v. Gurney, L. R., 6 H. L. 377; Cornell v. Hay, L. R., 8 C. P. 328; Hallows v. Fernie, L. R., 3 Eq. 520; Henderson v. Lacon, L. R., 5 Eq. 249; Stewart v. Austin, L. R., 3 Eq. 299; Ship v. Crosskill, L. R., 10 Eq. 73; Mabey v. Adams, 3 Bosw. 346.

And where a corporation has no authority to borrow money, but the directors receive money, and give a receipt therefor as if lent to the corporation, they are personally liable therefor. Richardson v. Williamson, L. R., 6 Q. B. 276; Weeks v. Profert, L. R., 8 C. P. 427.

[2] Wakeman v. Dalley, 51 N. Y. 27. See, also, Bruff v. Mali, 36 id. 200; Arthur v. Griswold, 55 id. 400; Cazeaux v. Mali, 25 Barb. 578; Newberry v. Garland, 31 id. 121; Cross v. Sackett, 2 Bosw. 617; Mabey v. Adams, 3 id. 346; Morse v. Swits, 19 How. Pr. 275.

As to the liability of directors to stockholders and creditors in equity, see *post*, ch. 16.

[3] Scott v. De Peyster, 1 Edw. (N. Y.) 513; Hodges v. The N. E. Screw Co., 3 R. I. 9.

But they cannot benefit themselves to the prejudice of creditors. Richards v. New Hampshire Ins. Co., 3 Wend. 130; People v. Ballou, 12 id. 277; Talmadge v. Fishkill Iron Co., 4 Barb. 382; Butts v. Wood, 38 Barb. 181.

The directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders, and are bound to administer its affairs according to the terms of its charter and in good faith. If they fail in either respect they are liable to the party in interest, who is injured by it, for a breach of trust, and may be required to account to him in a court of chancery.

Hodges v. New Eng. Screw Co., 1 R. I. 312; Bank of St. Mary's v. St John, 25 Ala. (N. S.) 566. But see Patterson v. Baker, 34 How. Pr. 180; Winter v. Baker, id. 183.

The members of the governing body are the agents of the corporation; and if they exercise their functions for the purpose of injuring its interests and alienating its property, they are personally liable for any loss occasioned thereby. Attorney-General v. Wilson, 1 Craig & Ph. 1; 10 Law J. (N. S.) 53; 4 Jur. 1174.

And if a director of a manufacturing

for his fraudulent acts;[1] and he may be sued by one who has been damaged by his assent to a dividend amounting to more than the profits, even without joining with him the company as a defendant.[2]

And it has been held that a director is personally responsible, not only for fraud and willful malfeasance, but also for his negligence, especially gross negligence. Thus, it has been held that every director would be personally liable for the fraudulent action of a board which he might have averted by an attendance at a board meeting, but by reason of his negligence or willful inattention to his duty, he failed to do; or, if he attends the meeting but fails to use his best judgment in opposing fraudulent acts, he would be liable for all the injurious consequence of his failure of duty, and which he might with reasonable care have averted. "Every absent director," observes Justice MARTIN, "is equally responsible in case of extreme neglect in his attendance at the board, or, in case, after the act comes or must have come to his knowledge, had he used due diligence, he does not labor to avert its injurious consequences."[3]

But, although directors may be liable and required to indemnify parties injured on account of their fraud and abuse of trust, they cannot be held personally responsible, where the injury is the result of mere mis-judgment, or only unwise, extravagant, improvident, slightly negligent, or a simple error in the performance of their duties. The only effectual remedy in such cases is to change the board and thereby the management of the corporate affairs.[4]

company has assented to a dividend of more than the profits, he may be sued for such violation of duty without joining with him the company as co-defendant. Hill v. Frazier, 22 Pa. St. 320. See, also, Kimmel v. Stoner, 18 id. 155.

[1] Crook v. Jewett, 12 How. Pr. 19.

If a director of a corporation knowingly issues or sanctions a prospectus containing false statements of material facts, the natural tendency of which is to deceive and to induce the public to purchase the corporate stock, he is liable to the damages sustained by one who, relying upon and induced by the statements, makes such a purchase. And it is sufficient to sustain the action that the false statements were one, although not the sole, inducement to the purchase. Morgan v. Skiddy, 62 N. Y. 319.

[2] Hill v. Frazier, 22 Pa. St. 320.

[3] Per MARTIN, J., in Percy v. Millaudon, 3 La. 575. See, also, United Society v. Underwood, 9 Bush, 617.

[4] Sears v. Hotchkiss, 25 Conn. 171; Howe v. Deuel, 43 Barb. 504; Belmont v. Erie R. Co., 52 id. 637; Western Bank of Scotland v. Bairds, L. R., 4 Ch. 381; Turquand v. Marshall, L. R., 4

SEC. 172. **The fiduciary character of directors.** — It will be apparent from what has been said that the relation not only of principal and agent exists between the corporation and the directors, but also the relation of trustee and *cestui que trust* exists between them and the stockholders and creditors. Accordingly they have no right to enter into or participate in any combination the object of which is to divest the company of its property and obtain it for themselves, to the prejudice of the members or creditors.[1] Nor are they entitled to any share of capital stock, or to any dividends of the profits, until its creditors are paid. The property of the corporation, in equity, is regarded as held in trust for the payment of its debts; and a sale of its capital stock, and a division of the proceeds among the directors, will not defeat the rights of creditors; but they may proceed in equity to compel the directors to contribute *pro rata* out of the moneys so received and in their hands.[2] On this subject tne supreme court of the United States say: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into

Ch. 376; Green's Brice's Ultra Vires, 406 *et seq.*; Spering's Appeal, 71 Pa. St. 11; Gobold *v.* Mobile Bank, 11 Ala. 191; Smith *v.* Prattville Man. Co., 29 Ala. 503; Bank *v.* St. Johns, 25 Ala. (N. S.) 566; Pontchartrain, etc., R. Co. *v.* Paulding, 11 La. 41.

It has recently been held in England that where directors assume to act for a company, they impliedly warrant their authority so to do; and that where they stated that they had appointed an agent with certain powers, they were personally liable without any proof of actual warranty, as that would be implied from the appointment of the agent. Colonial Bank *v.* Cherry & McDougall, 17 W. R. 1031. So, directors may be liable for the fraudulent acts of co-directors, which they might have prevented. Joint-Stock Discount Co. *v.* Brown, 17 W. R. 1037.

Where the directors of a railway assumed to act, by accepting bills of exchange, they were held personally liable. Owen *v.* Van Uster, 10 C. B. 318; Roberts *v.* Button, 14 Vt. 195. See, also, Turquand *v.* Marshall, L. R., 6 Eq. 112. As to personal liability of directors for a check drawn by them in the name of the company, and signed by their individual names, where they were held personally liable, see Serrell *v.* Derbyshire, etc., R. Co., 19 Law J. 371; S. C., 9 C. B. 811.

[1] Jackson *v.* Ludeling, 21 Wall. 616.

But if a corporation fails to legally organize under the provisions of a statute, and does not become a corporation *de jure*, and cannot legally issue stock, the issue of such stock by the directors will not alone make the directors liable for a fraudulent conspiracy to issue worthless stock. Nor can an intent to deceive be inferred from these circumstanses, and the fact that the nominal is largely in excess of the actual capital. Nelson *v.* Luling, 62 N. Y. 645.

[2] Story's Eq. Jur., § 1252; Mumma *v.* Potomac Company, 8 Pet. 286; Wood *v.* Dummer, 3 Mason, 308; Vose *v.* Grant, 15 Mass. 522; Spear *v.* Grant, 16 id. 14; Curran *v.* Arkansas, 15 How. 307.

whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that the stockholders are not entitled to any share of the capital stock nor to any dividend of the profits, until all the debts of the corporation are paid."[1]

SEC. 173. This doctrine would, of course, be applicable in all cases of fraudulent or wrongful disposition or appropriation of the corporate funds or property, by directors. For as agents and trustees of the corporation as well as the stockholders and creditors, they would be bound to perform their duties and administer the trust in good faith; and any portion of the corporate property wrongfully received by them would be liable to the satisfaction of the claims of creditors and stockholders; and such directors would be required, in a proper proceeding, to account for the same. They have no right to enter into or participate in any combinations the object of which is to divest the corporation of its property, and obtain it for themselves, to the prejudice of the members or creditors.[2]

Neither have they the power to give away the corporate funds, or deprive the corporation of its means to accomplish the purposes for which it was chartered;[3] or dispose of the stock at a less price than fixed by the charter;[4] or in a manner not provided by the charter;[5] or to disregard a by-law imposing limitations on their powers; or to amend such by-laws or other regulations of the corporate body, so as to confer greater authority upon them. And a breach of duty in these respects would subject them to personal liability.[6] And a resolution of a board of directors, the design and effect of which is to transfer the property of the company to themselves, by way of inducement to pay their just debts to the company, is void.[7] So, for any willful breach of their trust, or misapplication of the corporate funds, or

[1] The Chicago, etc., R. Co. *v.* Howard, 7 Wall. 392. See, also, Hale *v.* Bridge Co., 8 Kans. 466; Jones *v.* Terre Haute R. Co., 29 Barb. 359; Barton *v.* Port Jackson R. Co., 17 id. 397.

[2] Jackson *v.* Ludeling, 21 Wall. 616. See *post*, ch. 14.

[3] Bedford R. Co. *v.* Bowser, 48 Pa. St. 29.

[4] Sturges *v.* Stetson, 3 Phil. (Pa.) 304.

[5] Royalton *v.* Turnp. Co., 14 Vt. 311.

[6] Stevens *v.* Davison, 18 Gratt. 819.

[7] Hilles *v.* Parrish, 14 N. J. Eq. 380.

for any gross neglect of or inattention to their duties as trustees or directors, they are liable to any person who is damaged thereby.[1]

SEC. 174. **They cannot manage the affairs of the corporation for their personal benefit.**—The fiduciary character of directors referred to, is such that the law will not permit them to manage the affairs of the corporation for their personal and private advantage, when their duty would require them to work for, and use reasonable efforts for the general interests of the corporation and its stockholders and creditors. The confidence reposed in them cannot be thus abused with impunity; and they cannot use their position to promote their own interest in respect to any thing thus intrusted to them, to the prejudice of creditors or other members. "Nor is it possible to limit the duty of a director of a corporation, in this respect, to the time while he was acting as director under any special delegation of power, or in attendance at meetings of the board. He cannot, while director, divest himself of the knowledge which he has acquired, in confidence, of corporate affairs, or of the value of corporate property, nor be allowed to use it to his own advantage."[2] For numerous authorities illustrating the duties and responsibility of directors and other officers as trustees, and their fiduciary character, reference may be had to the annexed note.[3]

[1] Robinson *v.* Smith, 3 Paige, 222. See, also, Hodges *v.* New England Screw Co., 1 R. 312; Butler *v.* Cornwell Iron Co., 22 Conn. 335; Colquitt *v.* Howard, 11 Ga. 556; Percy *v.* Millaudon, 3 La. 568; United Society *v.* Underwood, 9 Bush, 617. See, also, cases cited under the two previous sections.

[2] Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314. See, also, Koehler *v.* Black River Falls Co., 2 Black, 715.

[3] Risley *v.* Indiana, etc., R. Co., 1 Hun, 202; Gray *v.* New York, etc., 3 id. 383; Redmond *v.* Dickerson, 1 Stockt. 507; Hoffman Steam Coal Co. *v.* Cumberland Coal Co., 16 Md. 456; Goodin *v.* Whitewater Canal Co., 18 Ohio St. 169; Port *v.* Russell, 36 Ind. 60; Buell *v.* Buckingham, 16 Ia. 284; San Francisco R. Co. *v.* Bee, 48 Cal. 398; Drury *v.* Cross, 7 Wall. 302; Chicago, etc., R. Co. *v.* Howard, id. 392; Jackson *v.* Ludeling, 21 id. 616; Heath *v.* Erie R. Co., 8 Blatchf. 347; European, etc., R. Co. *v.* Poor, 59 Me. 277; Richards *v.* New Hampshire Ins. Co., 43 N. H. 265; Fuller *v.* Dame, 18 Pick. 472; Peabody *v.* Flint, 6 Allen, 52; Hodges *v.* New England Screw Co., 1 R. I. 312; Butts *v.* Woods, 37 N. Y. 317; S. C., 38 Barb. 181; Coleman *v.* Second Av. R. Co., 38 N. Y. 201; Ogden *v.* Murray, 39 id. 207; Bliss *v.* Matteson, 45 id. 22; S. C., 52 Barb. 348; Scott *v.* De Peyster, 1 Edw. Ch. 513; Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) 438; Buffalo, etc., R. Co. *v.* Lampson, 47 Barb. 533; Fremont *v.* Stone, 42 id. 169; Cumberland Coal Co. *v.* Sherman, 30 id. 553; Conro *v.* Port Henry Iron Co., 12 Barb. 64.

Nor can a stockholder, who is also a creditor of the corporation, in case of the insolvency of the company, or in the event that it is being

SEC. 175. **Contracts by directors with corporations.** — Courts of equity will regard with great jealousy the contracts made between directors and the corporation. And as a general rule such contracts are voidable at the instance of the company or stockholders; and this rule has been held to apply to cases where the majority of the directors in one corporation contract with another corporation, in which they are also directors.[1] It is their duty to act for the best interests of the company, and if they enter into a contract with the company, their duty as officers is in conflict with their duty as individuals. And the same doctrine has been held to apply, whether they are a party to the contract in its inception, or whether they subsequently acquire an interest in it;[2] as the rule is, that directors cannot acquire an interest, directly or indirectly, adverse to the corporation, and that, if they, taking advantage of their knowledge and position, make an advantageous bargain in the purchase of a claim against the corporation, the profits thus made will be treated as held in trust for the company.[3] But this will

wound up under the management of a receiver, be entitled to set off the amount due him, against lawful calls, nor to set off against such calls, anticipated or probable dividends. Green's Brice's Ultra Vires, 553; *Ex parte* Henry Winsor, 3 Story, 411; Cutler *v.* Middlesex Factory Co., 14 Pick. 483; McLaren *v.* Pennington, 1 Paige, 102; Osgood *v.* Ogden, 4 Keyes, 70.

[1] San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106; Abbot *v.* American H. R. Co., 33 Barb. 578; St. James Church *v.* Church of the Redeemer, 45 id. 356; Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 76; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

[2] European, etc., R. Co. *v.* Poor, 59 Me. 270.

[3] European, etc., R. Co. *v.* Poor, 59 Me. 277.

The general principle is that no man can faithfully serve two masters whose interests are or may be in conflict. The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. "It may be regarded," says Mr. Parsons, "as a prevailing principle of the law, that an agent must not put himself, during his agency, in a position which is adverse to that of his principal. For even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all this in his own favor." 1 Pars. on Cont. 74.

This principle has found expression in a large number of cases involving a great variety of circumstances, and it applies equally, whether one deals with himself, acting as sole trustee, or with a board of trustees, of which he is a member, or with the directors of a corporation, of whom he is one.

Thus, in Dobson *v.* Racey, 3 Sandf. Ch. 62, Dobson, being the owner of certain real estate, mortgaged it to Racey, and then executed a power of attorney to him, authorizing him to sell and convey the premises in such manner as he might deem proper, and out of the proceeds of the sale, after paying the mortgage debt, to pay over the surplus to the wife of Dobson. Dobson went abroad and died. Shortly after Dobson left, Racey, by virtue of

receive a further consideration when I come to treat of equitable rights and remedies.[1]

the power of attorney, conveyed the premises to one Harrison, who, without paying or agreeing to pay any thing therefor, two days thereafter reconveyed to Racey. Racey satisfied the mortgage, and paid one hundred dollars to the widow of Dobson. The action was commenced by the heirs of Dobson, claiming that the sale to Harrison was inoperative and void. The court, after declaring that it is now a settled rule, both in England and in this country, that no party can be permitted to purchase an interest when he has a duty to perform which is inconsistent with his character of purchaser, says: "The law declares the sale unwarrantable, on grounds of public policy, irrespective of any proof of injury or intentional wrong." See, also, Boyd *v.* Blankman, 29 Cal. 19.

In Pickett *v.* School District No. 1, etc., 25 Wis. 552, the plaintiff, who was the trustee of a school district, entered into a contract with the other two trustees, to build for the district a school-house. The stipulated price not being paid, he brought his action on the contract. The court said: "We think there is one fatal objection to the plaintiff's right to maintain this action, which renders it unnecessary to consider any of the other questions discussed. That is, that, inasmuch as it appears that the plaintiff was himself the director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position, and obtain the contract for himself from the board of which he was a member."

In Cumberland Coal Company *v.* Sherman, 30 Barb. 553, the president and secretary, in pursuance of a vote of the directors of the corporation, sold and conveyed to the defendant, who was one of the directors, a large tract of land. The action was commenced to have the deed declared void and canceled. After a very elaborate and searching review of the authorities, the court came to the conclusion that the deed could not be sustained. Among other things, it said: "There can be no question, I think, at the present time, that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature toward his principal, and is subject to the obligations and disabilities incidental to that relation.

"Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principles apply to him as one of a number as if he were acting as a sole trustee. It is not doubted that it has been shown that the relation of the director to the stockholders is the same as that of the agent to his principal, the trustee to his *cestui que trust*, and out of the identity of these relations necessarily spring the same duties, the same danger, and the same policy of the law."

In Aberdeen Railway Company *v.* Blaikie, 1 McQueen, 461, the House of Lords held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company, of which he was a director, or the chairman, at the date of the contract, could not be enforced against the company. Lord CRANWORTH, delivering the opinion of the court, says: "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal, and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to,

[1] See *post*, ch. 14.

In a recent case in Pennsylvania, where a bill was filed by a minority of stockholders to set aside a sale of property of an insolvent corporation, made to certain creditors some of whom were also directors, it was observed by STRONG, J., as follows: "I come then to consider the facts that the purchasers were the same persons as those who as directors sold, and as stockholders authorized the sale. It is often said, and truly, that the same persons cannot be both buyers and sellers in the same transaction. They were not strictly in this. All the purchasers were not directors who made the sale. But I make no account of that. Still, why may not directors of a corporation sell to themselves? Each director has an interest distinct and antagonistic to his interest as a mere man. There is an identity of person but not of interest. There must be many things which directors can do for their individual benefit, which are binding upon a corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with the corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity And though ordinarily the law frowns upon contracts made by them in their representative character with themselves as private persons, such contracts are not necessarily void. They are carefully watched, and their fairness must be shown. But I repeat the question, why may not directors sell to themselves in any case? It is because of the danger that the interests of stockholders may suffer, if such sales be permitted, for want of antagonism between the parties to the contract. But such sales are supported in equity where the fiduciary relation of the purchasers has ceased before the purchase, where the purchase was made with the full consent of the stockholders, or where stockholders have, by their acquiescence, debarred themselves from questioning the transactions. I do not, however, deem it necessary to decide that the rule in this case was absolutely indefeasi-

that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still, so inflexible is the rule that no inquiry on that subject is permitted."

ble. The utmost the complainants claim is that it was voidable. Certainly nothing more can be claimed. Let it be, then, that it might have been set aside at the instance of the corporation, or even of a stockholder, as against the policy of the law and constructively fraudulent. Still, it was valid in equity as well as in law, unless one or the other chose to avoid it; and in all cases in which an attempt is made to fasten a constructive trust upon a purchaser, the attempt must fail unless made in a reasonable time."[1]

SEC. 176. The leading doctrine thus clearly set forth has been also held by recent cases in other states, where contracts are made with directors or officers of a railroad company for the purpose of securing their influence or interest in ataining the location of depots or machine shops, or the construction of the road so as to promote private interests; and especially would this be the case where the interest of the director under the contract thus made would depend upon the location as desired. The corporation, as well as the stockholders and creditors, would be not only entitled to the unbiased judgment of the director, which could not be expected under the above state of facts, but also to the benefit of his influence and argument in deciding such questions as a member of the board, which, of course, would be unreasonable to expect under the facts supposed.[2] And such a course would tend

[1] Ashurst's Appeal, 60 Pa. St. 291. See, also, Chester v. Dickerson, 54 N. Y. 1; Getty v. Devlin, id. 403; Barton v. Plank Road Co., 17 Barb. 397.

Where a contract in which two of the directors were interested was made with the company, it was held "that nothing short of a ratification by the board, after a full explanation and knowledge of their interest and all the circumstances, could render such a contract binding upon the company." Per CHRISTIANCY, J., in Flint, etc., R. Co. v. Dewey, 14 Mich. 477.

This doctrine was carried to great extremes in the case of Fuller v. Dame, 18 Pick. 472, in which case there was a contract, not with a director or officer of the corporation, but with a member merely, for a payment of a pecuniary consideration to such corporation on the location of a depot in a specified place; that such a contract was against public policy was held on the ground that the interests of the corporation and the public were identical; that each member was required to use his best and unbiased judgment upon the question of the fitness of the location without the influence which such an arrangement might have; and that the question involved was one of good faith, to be left to the jury. Stark Bank v. United States Pottery Co., 34 Vt. 144.

[2] Pacific R. Co. v. Seely, 45 Mo. 212; Linder v. Carpenter, 62 id. 309; Ogden v. Murray, 39 N. Y. 202; *Re* Union Pacific R. Co., Cent. L. J. 52.

to sacrifice both the public rights and the interests of stockholders.[1]

[1] In the case of European, etc., R. Co. *v.* Poor, 59 Me. 277, APPLETON, C. J., said: "A trustee is one in whom property is vested in trust for others. Every person is to be deemed a trustee to whom business and interests of others are confided, and to whom the management of their affairs is intrusted. The general rule is that a trustee, so far as the trust extends, can never become a purchaser of the property embraced within the trust, save with the consent of all parties interested. The underlying principle is that no man can serve two masters. He who is acting for others cannot be permitted to act adversely to his principals. The agent to sell cannot become a purchaser of that which he is the agent to sell, for his position as selling agent is adverse to and inconsistent with that of a purchaser. So, the agent to purchase cannot, at the same time, occupy the position of a seller. It is not that in particular instances the sale or the purchase may not be reasonable. But to avoid temptation the agent to sell is disqualified from purchasing, and the agent to purchase from selling. In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sales or purchases if he deems it for his interest. The affirmance or disaffirmance rests with him, and the trustee, when buying trust property from or selling it to himself, must assume the risk of having his contracts set aside, if the *cestui que trust* is dissatisfied with his action."

The directors are not sureties for the fidelity of the officers of the corporation which they may be authorized to appoint. If they exercise reasonable diligence in the appointment of agents and officers, this is all that is required. But if they should knowingly appoint a person of bad character to a place of trust, they would be personally responsible. See Scott *v.* Depeyster, 1 Edw. 513. See, also, Burbridge *v.* Morris, 34 L. J. (N. S.) 131.

The rule of equity is liberal, embracing within its purview all fiduciary relations, as those of principal and agent, attorney and client, solicitors, executors, guardians, etc.

The president and directors of a corporation must be held as occupying a fiduciary relation to the stockholders, for and on behalf of whom they act. "The relation between the directors of a corporation and its stockholders," observes JOHNSON, J., in Butts *v.* Wood, 38 Barb. 188, "is, that of trustee and *cestui que trust*." "The directors," remarks ROMILLY, M. R., in the York & Midland Railway Co. *v.* Hudson, 19 Eng. L. & Eq. 365, "are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake it, is their duty to perform fully and entirely." Persons who become directors and managers of a corporation place themselves in the situation of trustees; and the relation of trustees and *cestui que trust* is thereby created between them and the stockholders. Scott *v.* Depeyster, 1 Edw. Ch. 513; Verplanck *v.* Mercantile Ins. Co., id. 85. All acts done by the directors officially should be for the interests of the *cestui que trust*. Holding a fiduciary relation, they cannot be permitted to acquire interests adverse to such relation.

In European, etc., R. Co. *v.* Poor, *supra*, the court say: "The bill alleges that, 'at a meeting of the directors of said company (the E. & N. A. Railway Co.), holden on the 25th day of August, 1865, a contract previously made between said company and a certain firm, under the name of Pierce & Blaisdell, and signed by said defendant, as president of said company, and by said Pierce & Blaisdell, for the construction of said railroad, was approved, adopted and confirmed. That said Pierce & Blaisdell did proceed, under said contract, in the construction of said railroad, and received large sums of money under the same contract,' and 'that there was an agreement between said defendant while he was president and director, as aforesaid, and said firm of Pierce & Blaisdell, or one of the members of said firm, that said defendant should receive a large sum of money for or on account of said contract, or a part of the profits which might be received by said Pierce & Blaisdell, under and by their performance of said contract

SEC. 177. **Instances where they are not liable, etc.** — But the mere fact of being a director will not render a party personally liable for the frauds and misrepresentations of the active managers.

for the construction of said railroad.'

"To this portion of the bill the defendant has demurred, thereby admitting, for the purposes of the present argument, his interest in the contract of Pierce & Blaisdell, with the corporation of which he was president and a director, made when he was acting as such, and in the profits of which he was a participant while holding those positions. As the agent to sell cannot purchase what he is to sell, nor the agent to purchase buy of himself, so the agent to contract cannot, as agent, contract with himself as principal. The interest of the parties to a contract, whether of purchase, a sale, or for work or labor, are adverse and inconsistent with each other. It is the duty of the directors of a corporation to act for the best interests of such corporation. If a director be a party to a contract entered into with himself, his duty, as an officer, is in conflict with his interests as an individual. This is equally so, whether he enters into the contract on its inception, or subsequently acquires an interest in it. If he enters originally into the contract as director with himself as a party, it is not difficult to perceive who would have an advantage in the bargain. If he subsequently becomes a partner, he places himself in a position in which, when any questions arise as to its performance, his interest as a party to the contract conflicts with his duty as an officer. The general rule is, that directors cannot legitimately acquire an interest adverse to the corporation, and that if they purchase any claim against the company it is in trust for the company."

In the Great Luxenburgh Railway Co. *v.* Magenay, 25 Beav. 586, the Master of the Rolls says: "I have, upon various occasions, stated what I considered to be the duties and functions of a director of a joint-stock company. He is, in point of fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into in their behalf, to be treated as an agent; therefore there attaches to a director, for the benefit of the shareholders, all the liabilities and duties which attach to a trustee or agent. Accordingly, if a director enters into a contract for the company, he cannot personally derive any benefit from it. I accordingly held, in the case of the Midland Railway Co. *v.* Hudson, that the defendant, as director and trustee, was bound to give to the company the benefit of a large contract entered into by him for iron, which had been used on the railroad, and to render to them the pecuniary advantage which he had derived from it. If, as in the case of the North Midland Railway Co. *v.* Hudson, a director of a railway company enter into a contract for the purchase of a large quantity of iron in the shape of rails, but before it is wanted and before it has been actually delivered (for it took some time in that case to perform the contract with the iron master) the price of iron should happen to rise, the trustee is not at liberty to put into his pocket the difference between the market price of the iron when delivered and that at which it was purchased. He cannot sell it again to the company as if it were his own property. The whole benefit must go to the shareholders and not to the director."

In Benson *v.* Heathern, 1 Y. & Coll. 326, the defendant, being director of a joint-stock company, established for the building, purchasing, hiring, and employment of steam vessels, purchased a vessel for £1340, and afterward sold it to the company as from a stranger, for £1500, charging the company with commission at £1 per cent, the broker's earnest money and the expenses of a bill of sale to himself, there being but one bill of sale. It was held that such a transaction could not stand in equity.

In Flint & R. R. Co. *v.* Dewey, 14 Mich. 477, it appeared that the defendant, the secretary, and another director had been appointed a committee by the company for building and equipping the road. The committee entered

Without knowledge of, and participation in the fraudulent act, as by lending his name and influence to promote the fraud, or some willful or negligent violation of duty, he cannot be held personally responsible.[1] But the relation he occupies to the company and its creditors will not prevent directors or other officers and agents from protecting themselves as creditors of the company by the same means that are open to others. Thus, where the president and two directors of a company constituted a quorum, and they, being the only stockholders at the time, sold corporate property to the president in consideration of past indebtedness, and an agreement by him to pay other specified debts of the corporation, and a judgment debtor levied upon the property thus sold, it was held that he might be enjoined from proceeding under his levy. DILLON, J., in this case, observes: "Be-

into a preliminary contract with a certain party and on the same day that party assigned to the defendant's secretary three-eighths of said agreement and four-tenths of a contract to be thereafter entered into, also, providing that they should be at three-eighths the expense of negotiating the bonds of the company which were to be received by the contractor.

In a suit by the complainant to compel the delivery of said bonds, it was held that the transaction under which the defendant claimed was clearly fraudulent and void as against the complainant, that it was his duty (with the other members of the committee) on letting the contract, to use his best efforts and judgment to secure the best terms he could for the company; but in joining with the contractor in taking this very contract which they were employed to let, it became his interest to let the contract at the highest price. "It is possible," observes CHRISTIANCY, J., "that there may have been no actual fraud, and that the contract would not have been let on better terms; but the principle of law applicable to such a contract renders it immaterial, under the circumstances of the case, whether there has been any fraud in fact, or any injury to the company. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal; and if such contracts were to stand until shown to be fraudulent and corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud and corruption."

"The general rule of law," observes WAYNE, J., in Michaod *v.* Girod, 4 How. 555, "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private."

To give effect to these views in England it is provided by the Companies' Clause Consolidation Act, 8 and 9 Vict., c. 16, that no person interested in a contract with the company shall be a director; and if any director, subsequent to his election, shall become concerned in any contract, the office of director shall become vacant and he shall cease to act as such.

[1] But it is held in Blanchard *v.* Kaull, 44 Cal. 440, that the signing of a note by parties as trustees did not render them personally liable even where there was no corporation. As to fraudulent overissue of stock, see Bruff *v.* Mali, 36 N. Y. 200; Cazeaux *v.* Mali, 25 Barb. 578; Shotwell *v.* Mali, 38 id. 445.

ing an officer of the corporation did not deprive Buel [the plaintiff] of the right to enter into competition with other creditors, and run the race of vigilance with them, availing himself, in the contest, of his superior knowledge, and of the advantage of his position, to obtain security for or payment of his debt. The act of Buel was not legally or constructively fraudulent, in consequence of his being an officer or member of the company."[1]

SEC. 178. **Where they act without authority.**—The general rule of personal liability of agents, where they act without the authority which they assume to have, has also been applied to persons assuming authority in making contracts for a corporation which had no legal existence.[2] The general principle is thus stated by Mr. Story: "Wherever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal."[3] And whether the assumed agency is *bona fide* or *mala fide*, the personal liability would exist for damages sustained thereby, on the plain principle not only of equity but of justice, that where one of two innocent parties must suffer a loss, it ought to be borne by the one who induced the other, by false assumptions and representations, to enter into relations by which the loss is sustained.[4] The effect of acting without authority in making contracts, etc., has already been considered.

[1] Buell *v.* Buckingham, 16 Ia. 284. See, also, Merrick *v.* Peru Coal Co., 61 Ill. 472; Sargent *v.* Webster, 13 Metc. 497; Whitewell *v.* Warner, 20 Vt. 425; Hayward *v.* Pilgrim Soc., 21 Pick. 270; Smith *v.* Lansing, 22 N. Y. 526; Stratton *v.* Allen, 1 C. E. Green, 229; City of St. Louis *v.* Alexander, 23 Mo. 483; Murray *v.* Vanderbilt, 39 Barb 140; Van Hook *v.* Somerville Manuf. Co., 1 Halst. Ch. 137, 633.

The most effectual remedy in such cases is by injunction to restrain the wrongful act. Thus, where they have authority to issue convertible bonds for the legitimate purpose of completing and operating a railroad, they will be restrained from issuing them as a part of a fraudulent device to increase the stock; or when so issued, a person affected with notice thereof, and that they do not represent a *bona fide* indebtedness, may likewise be restrained by injunction. See, also, where various other acts of directors will be restrained by injunction, Belmont *v.* Erie R. Co., 52 Barb. 637.

[2] Herod *v.* Rodman, 16 Ind. 241. See, also, Gratz *v.* Redd, 4 B. Monr. 178.

[3] Story on Agency, § 264; Paley on Agency, by Lloyd, 386; 2 Kent's Com. 629.

[4] See *ante*, ch. 9, § 199 *et seq.* See, also, ch. 14.

SEC. 179. **Liability of partners.**—It may also occur that parties, assuming to act as directors of a corporation, when they are not, or where there is no corporation, may render themselves liable as partners to those with whom they contract. But in such a case it must appear, in order to hold any one of them as such, that he was so acting at the time the contract was made.[1]

SEC. 180. **Directors de facto.**—It is a general principle of the law, that persons acting as directors of a corporation, and generally recognized as such, are at least directors *de facto;* and their acts are valid until they are ousted in some direct proceedings therefor.[2] And a board of directors *de facto*, in possession of the franchises of a corporation, may maintain an action against persons claiming to constitute a board of directors, for any trespass relating to the corporate property; and the acts of such *de facto* officers cannot be collaterally impeached.[3]

SEC. 181. **Compensation of.**—Directors are entitled to such compensation as may be provided by the constitution or by-laws of the association. But it has been held that no extra and gratuitous service rendered by such officer raises any implied promise that they are rendered at the request of the party benefited by them, or entitles him to maintain an action therefor.[4]

It was held in Indiana, that, where no provision is made in the organic law or the by-laws of the corporation, nor any special contract made relating to compensation for services, none could be recovered; and that, in the absence of any such provisions, where the board of directors made an allowance to themselves for ser-

[1] Fuller *v.* Rowe, 57 N. Y. 23; S. C., 59 Barb. 344; Wells *v.* Gales, 18 id. 584. But see Blanchard *v.* Kaull, 44 Cal. 440.

[2] Vernon Society *v.* Hills, 6 Cow. 26; All Saints' Church *v.* Lovett, 1 Hall, 191.

[3] Atlantic, etc., R. Co. *v.* Johnston, 70 N. C. 348. The regularity of an organization, that has for years acted as a corporation cannot be questioned collaterally but only by *quo warranto* or *scire facias.* Thompson *v.* Candor, 60 Ill. 244. See, also, Shewalter *v* Pirner, 55 Mo. 218.

[4] Loan Association *v.* Stonemetz, 29 Pa. St. 534. See, also, Barstow *v.* City R. Co., 42 Cal. 465. They are not entitled to compensation, unless some provision is made therefor in the constitution or by-laws, or for extra services, unless unquestionably beyond the range of his official duties. New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170. See, also, where there was a delay in claiming for extra services, Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652.

vices, and issued orders of the company therefor, these were invalid.[1] And where a board of directors, in addition to their fixed salary, voted a certain compensation for all special services performed by any director, it was held that a director could not recover beyond the regular salary, provided the services could have been performed by the party as such director.[2]

SEC. 182. **Cannot increase their own compensation.**—As one of the relations between the director and the corporation, as we have seen, is that of a trustee and *cestui que trust*, if a director claims an increase of compensation beyond that provided by law, he is disqualified from acting on the question, and if he is necessary to constitute a quorum, in the vote on such claim, the acts of the board so constituted, increasing the compensation, would be invalid, and would not bind the corporation.[3]

In the absence of provisions in the charter or by-laws of the body, or any regulation thereof, by custom, on the subject, directors in England, it appears, are not entitled to recover any

[1] Maux Ferry Gravel Road Co. *v.* Branegan, 40 Ind. 361. See, also, Hall *v.* Vermont, etc., R. Co., 28 Vt. 401; Pierson *v.* Thompson, 1 Edw. Ch. 212.

[2] Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220. See, also, New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170; Henry *v.* Rutland, etc., R. Co., 27 Vt. 435; Shackelford *v.* N. O. R. Co., 37 Miss. 202; Hall *v.* Vermont, etc., R. Co., 28 Vt. 401; Loan Association *v.* Stonementz, 29 Pa. St. 534.

[3] Butts *v.* Wood, 37 N. Y. 317.

And where a director of a railroad corporation rendered special services in procuring subscriptions to the stock of the company in its organization, which services were rendered by him in expectation of a compensation, and the stockholders, in consideration thereof, voted him a free pass over the road for himself and family during his life; which, although an inadequate compensation, was accepted by him as such; but some years afterward the stockholders rescinded the vote, and an action was brought by the company to recover the fares; it was held that the services rendered created no indebtedness, and could not constitute a consideration for the contract; that it would have made no difference if the services had been rendered upon an express understanding with his associates that he was to be paid by the company after its organization, as aside from the technical difficulty of binding a corporation before its existence, the policy of the law wholly discountenances such arrangements. New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170. See, also, Branch Bank Ala. *v.* Collins, 7 Ala. (N. S.) 95.

In relation to the compensation of municipal officers, Mr. Dillon observes: "There is no such implied obligation on the part of municipal corporations, and no such relation between them and officers, which they are required by law to elect, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law." Dill. on. Mun. Corp., § 169; Sikes *v.* Hatfield, 13 Gray, 347; Barton *v.* New Orleans, 16 La. Ann. 317; Garnier *v.* St. Louis, 37 Mo. 554; Smith *v.* Commonwealth, 41 Pa. St. 335; Devoy *v.* New York, 39 Barb. 169; Bladen *v.* Philadelphia, 60 Pa. St. 464; Philadelphia *v.* Given, id. 136

compensation for services.[1] But there would appear to be no good reason why they should not be entitled to a reasonable compensation, the same as agents of individuals, on an implied promise to pay therefor so much as the same is reasonably worth.

SEC. 183. **Meetings of directors.** — We shall hereafter, in considering the subject of corporate meetings, treat of the meetings of the directors, managers or trustees of corporations, and show the mode of proceeding at them, and of expressing the will of the corporation through them. A consideration of this subject here will, therefore, be unnecessary.[2]

[1] Dunston *v.* The Imp. Gas-light Co., 3 B. & Ad. 125; Redf. on Rail., § 137.

[2] See *post*, § 226 *et seq.*

CHAPTER VII.

OFFICERS AND AGENTS GENERALLY.

SEC. 184. **Necessity for corporate agents.** — We have alluded to the necessity of corporations acting by agents. The principal part of the general business of a corporation, it being an imaginary person, must necessarily be performed by agents and servants, duly appointed and employed. All of its officers, as respects such corporation, are agents. In fact, no act can be directly done by such corporation, except through the voice or vote of its members, who, in this respect, by a fiction of the law, are supposed to represent the ideal and fictitious corporate body, of which they are members. They may act, by a majority, as the act of the corporation; but all other acts, by or on behalf of the corporation, must be performed by agents. The importance of the law of

agency in connection with corporations will, therefore, be manifest. The general law of agency as applicable to the relations between the corporation and its agents, is of greater importance than where mere private or natural persons only are concerned. For corporations must necessarily employ them. They have no other alternative. Each officer, including the directors, managers or trustees, are agents of the corporation; besides, it is usually necessary, in carrying on the objects of private corporations, to employ agents for special purposes.

In all acts of the corporation, by or through agents, the general doctrine applies that what one does by the agency of another, he does himself, the familiar maxim being, *qui facit per alium, facit per se.*

SEC. 185. **General limitations on the authority of agents.** — It may be further observed that the authority of corporate agents can never exceed the rights, powers and authority of the principal, and is usually less. It is seldom that all the powers of the corporation are vested in the board of directors, although they are usually the highest and most important officers and agents of a corporation. The powers and authority of officers and agents may be, and with the more important of them, usually is, limited by either the fundamental law or the by-laws of the organization. But with the minor and inferior agents their authority is usually prescribed and limited by acts and resolutions of the corporation, or their immediate, and for most purposes general agents, the board of directors, whose powers in this respect, as well as others, may, as we have seen, be also limited by its organic or constating laws.

SEC. 186. **Directors as agents.** — We have already considered the agency of directors in treating of those officers.[1] They are the most important of corporate agents, as on them usually devolve the management of all the affairs of the corporation. In view of the usual powers conferred upon them, they may almost be said to be the corporation, the reserved powers of the corporation in a majority of cases being the mere right to annually ex-

[1] See *ante*, ch. 6.

press, through the members at large, the corporate will as to the policy and management of the corporate affairs by an election of such directors or managers as will execute such will. If the directors do not manage the affairs of the corporation intrusted to them with prudence or discretion in the opinion of the majority of the members representing a majority of the shares of stock, such members may replace them with others, at any meeting of the corporate body for such an election, provision for which is usually made in the fundamental law of the corporation; and thereby the corporate will, in these respects, in theory at least, may be executed. As we have already considered the subject of directors, and shall hereafter treat of corporate meetings and the mode of expressing the corporate will, a further consideration of these will here be unnecessary.[1] We will, therefore, proceed to consider more particularly the powers and authority, as well as the responsibilities, of other officers and agents.

SEC. 187. **Appointment of agents.** — We shall hereafter allude to the manner of appointing agents in discussing the subject of the corporate seal. We shall there refer to the old doctrine, that a corporation can only express its will or speech through a common seal; that this is the artificial voice of the artificial person; and attempt to show that this claim was never well founded, as the will of the corporation was always, in theory at least, the fairly-expressed will of those representing a majority of shares of the stock of the corporation.

SEC. 188. The use of the seal for the appointment of many, if not most, of corporate agents, as well as in the making of most of the various contracts, required in the execution of the powers and objects of corporations created for various purposes, has, in modern times, been practically abandoned. It is no longer regarded as the corporate voice, or as an important evidence of corporate assent. In fact, the practice of using the seal has been almost abandoned. The record of the corporate will, either as expressed by the majority of its members in attendance at a corporate meeting, or by the majority of the directors at a meeting duly called, is the highest and best evidence, and agents for any

[1] See *ante*, ch. 6.

and all purposes may be thus appointed and constituted, without any other written authority, or any authentication thereof by the corporate seal.

On this subject it was observed by the supreme court of the United States, that "the technical doctrine that a corporation could not contract except under its seal, or in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agents could contract in their name without seal, it was impossible to support it; for, otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raises implied promises for the enforcement of which an action will lie."[1]

The doctrine that every thing, or that even important acts must be done by deed under the corporate seal, cannot be now supported. On the contrary, it now seems well established that an agent may be appointed merely by a vote of the corporation, or of the boards of directors, and that his acts, within the scope of his authority thus conferred, and within the powers of the corporation, will bind the corporation.[2]

SEC. 189. **What is within the scope of the agent's authority.** — Among the most difficult questions in the law of agency is the

[1] Bank of Columbia *v.* Patterson, 7 Cranch, 299; Gray *v.* Portland Bank, 3 Mass. 364; Worcester T. Co. *v.* Willard, 5 id. 80; Gilmore *v.* Pope, id. 491; Bank of Metropolis *v.* Guttschlick, 14 Pet. 19. A corporation may employ an agent to perform services consonant with its general design, without any specific authority for that purpose conferred by the charter. Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514. See, as to admissions of superintendent of a street railway, justifying an assault by one of its drivers, Malcoeck *v.* Tower Grove R. Co., 59 Mo. 514.

[2] The Bank of United States *v.* Dandridge, 12 Wheat. 64; Ang. & Am. on Corp., §§ 224, 383; Green's Brice's Ultra Vires, 356 *et seq.*, and notes; Chesapeake, etc., Can. Co. *v.* Knapp, 9 Pet. 541; Randall *v.* Van Vechten, 19 Johns. 65; Baptist Church *v.* Mulford, 3 Halst. 182; Perkins *v.* Washington Ins. Co., 4 Cow. 645; Lathrop *v.* Bank of Scioto, 8 Dana, 115; Savings Bank *v.* Davis, 8 Conn. 191; Union Bank of Maryland *v.* Ridgeley, 1 H. & G. 424; Legrand *v.* Hampden-Sidney College, 5 Munf. 324; Bates *v.* Bank of Alabama, 2 Ala. 461; Stamford Bank *v.* Benedict, 15 Conn. 445; City of Detroit *v.* Jackson, 1 Doug. (Mich.) 106; St. Andrew's Bay Land Co. *v.* Mitchell, 4 Fla. 192.

..ority to preside at meetings of the corporation or boards ·tors; to sign contracts and execute deeds of the corpora- ..nd, perhaps, generally to have charge of the corporate seal. ··re is an implied power, *virtute officii*, conferred upon the rs of banks to transfer and indorse negotiable securities held ..nks; as by virtue of the office he is intrusted with the notes -ecurities and other funds of the banks, and is usually held to the world as the general agent for the negotiation, man- ··ment and disposal of them. No special authority for this ..rpose is necessary to be shown, as such authority would be ..resumed.[1] And where a cashier of a bank habitually exer- ··ises powers as such with the knowledge and acquiescence of

[1] Wild *v.* Bank of Passamaquoddy, 3 Mason, 505. See, also, State *v.* Commercial Bank, 6 S. & M. 237.

In Massachusetts it has been held that neither a president nor a cashier of a bank has, *ex officio*, authority to transfer the property or other securities of the company, but must have express authority to that effect from the corporation at large, or the directors, as the case may be. Hallowell Bank *v.* Hamlin, 14 Mass. 178; Hartford Bank *v.* Barry, 17 id. 97.

Neither, it is said, can the president or cashier charge a bank with any special liability for a deposit contrary to its usage, without the previous authority or subsequent assent of the corporation. Foster *v.* Essex Bank, 17 Mass. 505.

In Massachusetts, however, it is admitted that a cashier has authority, *ex officio*, to indorse a note, the property of the bank, as a measure preliminary to a suit, and to authorize a demand upon the maker and notice to the indorser; Hartford Bank *v.* Barry, 17 Mass. 97; and to give new certificates of stock to a purchaser of shares sold on a tax warrant, on its face good, and issued by lawful authority, though the tax might have been improperly assessed. Smith *v.* Northampton Bank, 4 Cush. 1.

These narrow limits on a cashier's *ex officio* power are, however, by no means generally acknowledged. On the contrary, it is said that a cashier is usually intrusted with all the funds of a bank, in cash, notes, bills, etc., to be used from time to time for the ordinary and extraordinary exigencies of the bank. He receives, directly or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property when payments have been made. He draws checks, from time to time, for moneys, whenever the bank has deposits. He acts as the arm of the bank in carrying out the business arrangements and agencies assumed by the bank through the directors. In short, he is considered the executive officer, through whom and by whom the whole moneyed operations of the bank in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much then to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds, as the moneyed capital of the bank, to discharge its debts and obligations. Fleckner *v.* United States Bank, 8 Wheat. 360; Lafayette Bank *v.* State Bank of Illinois, 4 McLean (C. C.), 208; Ridgway *v.* Farmers' Bank, 12 S. & R. 265; Bank of Ky. *v.* Schuylkill Bank, 1 Pars. Sel. Cas. 243; Everett *v.* United States, 6 Port. (Ala.) 166; Stamford Bank *v.* Benedict, 15 Conn. 445; Crocket *v.* Young, 1 S. & M. 241; State *v.* Commercial Bank, 6 id. 237; Carey *v.* Giles, 10 Ga. 9; Ryan *v.* Dunlap, 17 Ill. 40.

The inducement to the transfer need not appear, but the courts will presume the transfer to have been properly made by the cashier, in the absence of proof to the contrary. Id.

the directors, this entitles the public and persons dealing with the bank to the benefit of a conclusive presumption that the party thus acting is authorized so to act, provided it is not in violation of the laws of its constitution, or contrary to the limitations of power contained in its organic laws or constating instruments.[1] The regular and lawful appointment of such an officer would be inferred from the circumstances. And the bank, in such a case, would be estopped, where the interests of third parties dealing with such bank required it, from denying the authority of such officer, and his power to act and perform the duties usually performed by such an officer. "If," says Justice STORY, "he was held out as an authorized cashier, that character was equally applicable to all who deal with the bank, in transactions beneficial as well as onerous to the bank."[2] And this recognition and permission of official acts is the same, whether the officer receives his appointment or election from the corporate body at large, or from a duly constituted board of directors.[3]

SEC. 191. In relation to the powers and authority of a president of a corporate body, it seems well settled that he may, as incidental to the office, and the execution of the trust reposed in him *virtute officii*, perform all the duties usually incumbent upon such officer, or such as custom or necessity has imposed upon the office, or such as is imposed by the general course of business of the corporation. In relation to this subject, in a recent case in Illinois, WALKER, J., observes: "As we understand the law, a

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604; Fleckner *v.* Bank of United States, 8 Wheat. 338; Minor *v.* Mechanics' Bank, 1 Pet. 46; Bank United States *v.* Dunn, 6 id. 51; United States *v.* Bank of Columbus, 21 How. 256; Baldwin *v.* Bank of Newburgh, 1 Wall. 234; Badger *v.* Bank of Cumberland, 26 Me. 428; Mussey *v.* Eagle Bank, 9 Metc. 306; Farmers' Bank *v.* Butchers' Bank, 4 Duer, 219; S. C., 16 N. Y. 125; Cooke *v.* State Bank, 52 id. 96; Bank of Pennsylvania *v.* Reed, 1 W. & S. 101; Ridgway *v.* Farmers' Bank, 12 S. & R. 256; Merchants' Bank *v.* Marine Bank, 3 Gill, 96; Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Robinson *v.* Bealle, 20 Ga. 275; Ryan *v.* Dunlap, 17 Ill. 40; State *v.* Commercial Bank, 14 Miss. 218; Morse on Banking, 137 *et seq.*

[2] Bank of United States *v.* Dandridge, 12 Wheat. 64. See, also, Burgess *v.* Pue, 2 Gill, 254; Barrington *v.* Bank of Washington, 14 S. & R. 421; Troy T. Co. *v.* McChesney, 21 Wend. 296; Warren *v.* Ocean Ins. Co., 16 Me. 439; Badger *v.* Bank of Cumberland, 26 id. 428; Davidson *v.* Borough of Bridgeport, 8 Conn. 472; Waite *v.* Mining Co., 36 Vt. 18.

[3] Conover *v.* Insurance Co., 1 N. Y. 290; Lohman *v.* New York R. Co., 2 Sandf. 39; Beers *v.* Phœnix Glass Co., 14 Barb. 358; Mead *v.* Keeler, 24 id. 20.

corporate body may, unless otherwise provided by their charter, appoint any member of the body, or other person, by their by-laws or by resolution, an agent to transfer or dispose of their property or negotiable securities. No officer of the body has that exclusive power, unless given by the charter. They may confer power on the president, treasurer, secretary, or other officer or person. But in the absence of both statutory authority and regulations of the body on the subject, the presumption might be indulged that the president, as the head of the organization, would have authority, if incident to the organization, or in conformity with the usage and custom of business. The doctrine seems to be settled that the president of a corporate body being its head, and through whom the corporate affairs of the corporation are constantly performed, and such acts are incident to the execution of the trust reposed in him, or such as custom or necessity has imposed upon the office, he may perform without express authority. And it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business of the company."[1]

But it has been held in Massachusetts, that neither the president nor the cashier of a bank has, *ex officio*, authority to transfer the property or securities of the bank, but that for this purpose they must have an express authority from the corporation or its directors.[2]

It has been held, also, that the receiving teller of a bank, where there is one, is the only proper officer to receive deposits, and that, if he receives the funds of a stranger and promises to apply them to the payment of a bill or note, he acts as the agent of the stranger, and not of the bank, and that the bank is not liable therefor;[3] and that if he exceeds his authority as a teller, and certifies a check upon the bank as "good," he cannot bind the bank in this way to pay the amount of such check to any person who may afterward present it, even where

[1] Mitchell v. Deeds, 49 Ill. 416; Chicago, etc., R. Co. v. Coleman, 18 id. 297. See, also, Elwell v. Dodge, 33 Barb. 336.

[2] Hallowell Bank v. Hamlin, 14 Mass. 178; Hartford Bank v. Barry, 17 id. 97; Foster v. Essex Bank, id. 94; Pendleton v. Bank, 1 T. B. Monr. 179, where it was held that a cashier had no authority *ex officio* to accept bills of exchange.

[3] Thatcher v. Bank of New York, 5 Sandf. 121; Mussey v. Eagle Bank, 9 Metc. 306.

there is a usage of that kind.[1] But this doctrine would appear unsound, and in New York it has been held that if a teller has made it a practice to certify checks, and of entering the same in a book, for the benefit of the officers of the bank, the bank is liable for checks so certified, though the teller fails to make the entry, and even though the bank has no funds of the drawer, provided the person claiming the same is a *bona fide* holder of them.[2]

[1] Mussey *v.* Eagle Bank, 9 Metc. 306.

[2] Farmers' Bank *v.* Butchers' Bank, 16 N. Y. 125.

In this case the action was by a *bona fide* holder of a negotiable check, which had been certified to be good by the paying teller of the bank (the defendant) on which it was drawn, and it was held that the bank under such circumstances was liable, although the drawer had no funds in the bank with which to pay the check, and the teller exceeded his authority in certifying the check as good. It appeared in this case that the teller was in the habit of certifying the checks of customers with the knowledge of the officers of the bank, and that he was furnished with a book for the express purpose of keeping a memorandum of such checks.

The court in this case observe: "His authority to certify, therefore, in a proper case, cannot be disputed. But it is insisted that his power extends only to cases where the bank had funds in hand, he having been expressly prohibited from certifying in the absence of funds, and hence that the bank is not bound. It may be doubted whether such a prohibition adds any thing to the restrictions which would otherwise exist upon the powers of the agent. A teller, acting under a general power to certify checks, would be guilty of an excess of authority and a clear violation of his duty if he certified without funds. * * * The bank selects its teller and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, so far as it is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be held responsible? * * * It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective and unauthorized. To discover that he must not only have notice of the limitations of the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the agent as to the extent of his powers. If, therefore, a person, knowing a bank has no funds of the drawer, should take a certified check upon the representation of the cashier, or other officer by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact whether the bank has funds or not the case is different. That is a fact which a stranger who takes a check certified by the teller cannot be supposed to have any means of knowledge. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case. It is,

SEC. 192. The exercise of powers by one assuming to be an officer or agent, as president, cashier, or treasurer, with a knowledge by the corporation, or its immediate representative, the board of directors, of such acts, within the scope of the corporate powers, and such as usually pertain to the office, would justify third persons and parties dealing with such corporation, to treat such officer or agent as lawfully appointed, and rightfully exercising the duties of the office.[1] And where officers are acting generally within the apparent scope of their authority, this will, as to third persons, raise a presumption that they have been authorized by all the required formalities.[2]

SEC. 193. The doctrine frequently announced is, that where a corporation places a person in a position which implies responsibility, and thereby leads others to confide in his integrity, especially in matters pertaining to the office or agency, and peculiarly within the knowledge of the officer or agent, the corporation

I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular in regard to which such party has or is presumed to have any knowledge with the terms of the power, he may take the representations of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by comparison of the power with the act done under it. The familiar case of the giving of a negotiable partnership note by one of the partners for his own individual benefit, affords an apt illustration of this rule. Each of the partners is the agent of the partnership as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing and accepting bills and notes in such business; but he has no more authority than a mere stranger to execute such paper in his own business, or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but when negotiated to a *bona fide* holder, the firm is precluded from questioning the authority of the partner, and is effectually bound. Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Laverty *v.* Burr, 1 Wend. 529; Williams *v.* Walbridge, 3 id. 415; Boyd *v.* Plumb, 7 id. 309; Gansevoort *v.* Williams, 14 id. 133; Joice *v.* Williams, id. 141; Wilson *v.* Williams, id. 146; Catskill Bank *v.* Stall, 15 id. 466; 18 id. 466. * * *. The fact of the agency, and the trust and confidence reposed by the principal in the agent, create a broad line of distinction between them; and it is this trust and confidence which constitute the foundation of the liability, and which justify the party dealing with the agent in relying upon his representation in respect to facts especially within the agent's knowledge."

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604; Fleckner *v.* Bank of the U. S., 8 Wheat. 338; Bank of U. S. *v.* Dunn, 6 Pet. 51; United States *v.* Bank of Columbus, 21 How. 356; Baldwin *v.* Bank of Newburgh, 1 Wall. 234; Badger *v.* Bank of Cumberland, 26 Me. 428; Cooke *v.* State Bank, 52 N. Y. 96.

[2] Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258; Green's Brice's Ultra Vires, 427 *et seq.*, and notes.

agency in connection with corporations will, therefore, be manifest. The general law of agency as applicable to the relations between the corporation and its agents, is of greater importance than where mere private or natural persons only are concerned. For corporations must necessarily employ them. They have no other alternative. Each officer, including the directors, managers or trustees, are agents of the corporation; besides, it is usually necessary, in carrying on the objects of private corporations, to employ agents for special purposes.

In all acts of the corporation, by or through agents, the general doctrine applies that what one does by the agency of another, he does himself, the familiar maxim being, *qui facit per alium, facit per se.*

SEC. 185. **General limitations on the authority of agents.** — It may be further observed that the authority of corporate agents can never exceed the rights, powers and authority of the principal, and is usually less. It is seldom that all the powers of the corporation are vested in the board of directors, although they are usually the highest and most important officers and agents of a corporation. The powers and authority of officers and agents may be, and with the more important of them, usually is, limited by either the fundamental law or the by-laws of the organization. But with the minor and inferior agents their authority is usually prescribed and limited by acts and resolutions of the corporation, or their immediate, and for most purposes general agents, the board of directors, whose powers in this respect, as well as others, may, as we have seen, be also limited by its organic or constating laws.

SEC. 186. **Directors as agents.** — We have already considered the agency of directors in treating of those officers.[1] They are the most important of corporate agents, as on them usually devolve the management of all the affairs of the corporation. In view of the usual powers conferred upon them, they may almost be said to be the corporation, the reserved powers of the corporation in a majority of cases being the mere right to annually ex-

[1] See *ante*, ch. 6.

press, through the members at large, the corporate will as to the policy and management of the corporate affairs by an election of such directors or managers as will execute such will. If the directors do not manage the affairs of the corporation intrusted to them with prudence or discretion in the opinion of the majority of the members representing a majority of the shares of stock, such members may replace them with others, at any meeting of the corporate body for such an election, provision for which is usually made in the fundamental law of the corporation; and thereby the corporate will, in these respects, in theory at least, may be executed. As we have already considered the subject of directors, and shall hereafter treat of corporate meetings and the mode of expressing the corporate will, a further consideration of these will here be unnecessary.[1] We will, therefore, proceed to consider more particularly the powers and authority, as well as the responsibilities, of other officers and agents.

SEC. 187. **Appointment of agents.** — We shall hereafter allude to the manner of appointing agents in discussing the subject of the corporate seal. We shall there refer to the old doctrine, that a corporation can only express its will or speech through a common seal; that this is the artificial voice of the artificial person; and attempt to show that this claim was never well founded, as the will of the corporation was always, in theory at least, the fairly-expressed will of those representing a majority of shares of the stock of the corporation.

SEC. 188. The use of the seal for the appointment of many, if not most, of corporate agents, as well as in the making of most of the various contracts, required in the execution of the powers and objects of corporations created for various purposes, has, in modern times, been practically abandoned. It is no longer regarded as the corporate voice, or as an important evidence of corporate assent. In fact, the practice of using the seal has been almost abandoned. The record of the corporate will, either as expressed by the majority of its members in attendance at a corporate meeting, or by the majority of the directors at a meeting duly called, is the highest and best evidence, and agents for any

[1] See *ante*, ch. 6.

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those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard."[1]

But the contracts of corporations need not necessarily be under seal;[2] and it is not essential that the appointment of the agent be under the common seal, or even evidenced by a recorded vote, but may be inferred from circumstances, such as the adoption and recognition of the agent's acts.[3]

SEC. 197. In the execution of a contract of the corporation by an agent, the proper way is to sign the corporate name to the instrument and the name of the agent acting for it, and to seal it with the corporate seal. It should appear on the face of the instrument that the contract is the contract of the corporation and not the personal act and contract of the agent. He should execute the instrument, so as in form to bind the principal; and it should show that the principal is intended to be bound by its provisions and not the party who acts for him. For it has been said, "that no person in making a contract is considered the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized, nor do I know of an instance in the books of an attempt to charge a person as the maker of any written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature. It is also held that whatever authority the signer may have to bind another, if he does not sign as agent or attorney he binds himself and no other person."[4] But this

[1] Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381. See, also, Amey *v.* Allegheny City, 24 id. 364; Connecticut Ins. Co. *v.* Cleveland, 41 Barb. 9; Ang. & Am. on Corp., § 636 and notes.

[2] See *post*, ch. 10.

[3] Dill. on Corp., § 374; Story on Agency, § 52; Fanning *v.* Gregoire, 16 How. 524; Abbey *v.* Billups, 35 Miss. 618; Allton *v.* Mulledy, 21 Ill. 76; Western, etc., Society *v.* Philadelphia, 31 Pa. St. 175; Clark *v.* Washington, 12 Wheat. 40.

[4] PARKE, J., in Stackpole *v.* Arnold, 11 Mass. 27. See, also, Bradlee *v.* Boston Glass Man., 16 Pick. 347; Alfridson *v.* Ladd, 12 Mass. 173; Savage *v.* Rice, 9 N. H. 263; Rice *v.* Gove, 22 id. 158; Minard *v.* Mead, 7 Wend. 68; Pentz *v.* Stanton, 10 id. 271; Spencer *v.* Field, id. 87.

doctrine has undoubtedly been much relaxed in modern times, and even less formalities in the execution of instruments by agents would undoubtedly serve to bind the principal, especially in the various common contracts into which corporations may enter by its agents.[1] But whatever modification of the former rule there may have been, it is evident that in the execution of a written instrument the name of the party intended to be bound should appear, and that when an agent executes an instrument he should do it in the name of the party for whom he acts. But if from the whole instrument it appears that the true object and intent is to bind the principal and not the agent, or where the purpose to act for the corporation is manifest from the whole paper, and where it does not appear from it that there is an intention to assume a personal responsibility on the part of the agent, the corporation and not the agent will be bound thereby, even though the agent only signs his own name and affixes his own seal.[2]

[1] See Higgins v. Senior, 8 M. & W. 834; Tainor v. Pendergrast, 3 Hill, 72; New England Ins. Co. v. De Wolf, 8 Pick. 56; 2 Kent's Com. 631; Dill. on Corp., § 376, and cases cited; Ang & Am. on Corp., § 298 and notes.

[2] 1 Dill. on Corp., § 376. See, also, Regents, etc., v. Detroit, 12 Mich. 138; Sweetzer v. Mead, 5 id. 107; Bank of Metropolis v. Guttschlick, 14 Pet. 19; Story on Agency, § 154.

Mr. Story, in relation to the mode of the execution of instruments by an agent, observes: "In such cases, in furtherance of the public policy of encouraging trade, if it can upon the whole instrument be collected, that the true object and intent of it are to bind the principal and not to bind the agent, courts of justice will adopt that construction of it, however informal it may be expressed. Thus, where an agent, duly authorized, made a promissory note thus: 'I promise J. S. or order,' etc., and signed the note 'Pro. C. D. A. B.,' it was held to be the note of the principal and not of the agent, although the words were, 'I promise.' So where A and B wrote a note in these words, 'We jointly and severally promise,' and signed it A and B for C, it was held to be the note of C, and not of A and B the agents. Rice v. Gove, 22 Pick. 158; Long v. Colburn, 11 Mass. 97. So, where the note was, 'I promise,' etc., and it was signed by the agent 'For the Providence Hat Manufacturing Company,' A B, the agent; it was held to be the note of the company and not of the agent. Emerson v. Prov. Hat. Man. Co., 12 Mass. 237. So, a promissory note of a like tenor, signed by the agent in this manner, 'A B, agent for C D,' has been held to be the note of the principal and not of the agent. Ballou v. Talbot, 16 Mass. 461; Despatch Line of Packets v. Bellamy Man. Co., 12 N.H. 229. So, where a promissory note was in these words, 'I, the subscriber, treasurer of the Dorchester Turnpike Corporation, for value received, promise,' etc., and it was signed 'A B, treasurer of the Dorchester Turnpike Corporation,' it was held to be the note of the corporation and not of the treasurer. Mann v. Chandler, 9 Mass. 335. See Hills v. Bannister, 8 Cow. 32; Story on Agency, § 276; Barker v. Mechanics' Fire Ins. Co., 3 Wend. 94; Mott v. Hicks, 1 Cow. 513; Brockway v. Allen, 17 Wend. 40. So, where a note purported to be a promise by 'the president and directors' of a particular corporation and was signed 'A B, president,' it was held to be the note not of

Thus, where a contract was entered into "between T. Van V., J. W., C. D. C., a committee appointed by the corporation of the city of Albany for that purpose, of the first part, and John R., Jr., of the second part;" and the parties of the first part agreed to pay for the work to be done, and signed their individual names and affixed their individual seals to the agreement, the authority of the committee to act for the corporation in the premises being conceded, it was held that the members of such committee were not personally liable, and that the remedy for a breach of the contract

A B, but of the corporation. Mott *v.* Hicks, 1 Cow. 513. See, also, Bowen *v.* Morris, 2 Taunt. 374; Shelton *v.* Darling, 2 Conn. 435; Brockway *v.* Allen, 17 Wend. 40; Story on Agency, §§ 278, 279. But if the note had been 'I, A B, president of the corporation (naming it), promise to pay,' etc., it would (it seems) have been deemed to be the personal note of A B, and not of the corporation. Barker *v.* Mechanics' Fire Ins. Co., 3 Wend. 94. So, where the agent of a corporation drew a bill of exchange upon the president of the corporation, styling him such, and the latter accepted the bill, it was held that he was not personally liable if he had authority to accept the bill, but the corporation was alone liable. Lazarus *v.* Shearer, 2 Ala. (N. S.) 718. So, where the agents of a corporation, being duly authorized, made a written contract, as follows: 'We hereby agree to sell,' etc., and signed it as agents of the corporation, it was held that they were not personally bound thereby, but the corporation was. Mary *v.* Beekman Iron Co., 9 Paige, 188; Evans *v.* Wells, 22 Wend. 325. * * * So, where, on a sale of real property by a corporation, a memorandum of the sale was signed by the parties, on which it was stated that the sale was made to A B, the purchaser, and that he and C D, 'mayor of the corporation on behalf of himself and the rest of the burgesses and commonalty of the borough of Caermathen, do mutually agree to perform and fulfill, on each of their parts respectively, the conditions of sale,' and then came the signature of the purchaser, and of 'C D, mayor,' it was held that the agreement was that of the corporation and not that of the mayor, personally; and that consequently the mayor could not sue them. So, where in articles of agreement the covenants were in the name of a corporation without mention of any agent, but the instrument was signed by the president of the corporation, by his private name, on behalf of the corporation, and sealed with his private seal, it was held that he was not personally liable thereon. Hopkins *v.* Mehaffey, 11 S. & R. 126; Story on Ag., § 273, note. On the other hand unless some agency is apparent on the face of the instrument, it has been not unfrequently held that the principal is not bound, although the agent had full authority to make the contract. Story on Ag., § 147, note. Thus, where a wife had full authority to sign notes for her husband, and she made a note in her own name, not referring to her husband, either in the body of the note or in the signature, it was held that the husband was not bound. Minard *v.* Mead, 7 Wend. 68. So, where A, B and C made a note as follows: 'We, the subscribers, jointly and severally promise to pay D, or order, for the Boston Glass Manufactory, the sum of —,' and signed the note in their own names, without saying 'as agents,' it was held that they were personally bound and not the corporation." Story on Ag., § 154; Bradlee *v.* The Boston Glass Manufactory, 16 Pick. 347.

And where an agent drew a bill for the purchase of goods on account of his principal, and signed the bill A. B., agent, but did not disclose the name of his principal, he was held personally bound by the bill as drawer. Prentz *v.* Stanton, 10 Wend. 271.

should be against the corporation.[1] So, where a bill of exchange directed to "A. B., cashier of F. & M. Bank," was accepted by the cashier as follows: "Accepted, A. B., cashier," by writing across the face of the bill; this was held to be the bill drawn upon and accepted by the bank, and the bank liable thereon and not the cashier personally.[2] And where a note payable to an insurance company was indorsed, "Without recourse, J. S., Secretary," it was held to pass the legal title to the indorsee.[3]

SEC. 198. It has even been held that in cases of doubt, as to the intention of the parties to a written instrument, that it was permissible to admit parol evidence to show the facts and the intention of the parties; as that the principal and not the agent should be bound. Thus, where a check was signed by the cashier of a bank without the addition of the word "cashier" to his name, but dated at the bank and made payable to its teller, as it was doubtful whether it was the private or the official act of the cashier, it was held proper to show this by parol evidence.[4]

The general principles applicable in case of the agents of a corporation, are the same as in case of the agents of natural persons; and reference may be had to special treatises on agency for a fuller illustration of the law relating to the sufficiency of the execution of contracts by agents to bind the principal.

[1] Randall v. Van Vechten, 19 Johns. 60. See, also, Dubois v. Canal Company, 4 Wend. 285; Worrall v. Munn, 1 Seld. 229; Ford v. Williams, 8 Kern. 577; Richardson v. Scott, etc., Co., 22 Cal. 150. But this doctrine seems to have been denied in Bank, etc. v. Patterson, 7 Cranch, 299. See, also, Damon v. Granby, 2 Pick. 345.

[2] Farmers' Bank v. Troy City Bank, 1 Doug. (Mich.) 457. See, also, Watervliet Bank v. White, 1 Den. 608; Jenkins v. Morris, 16 M. & W. 880; Thompson v. Tioga R. Co., 36 Barb. 79; Bird v. Daggett, 97 Mass. 495.

[3] Elwell v. Dodge, 33 Barb. 336; Scott v. Johnson, 5 Bosw. 213; Merchants' Bank v. McColl, 6 id. 473; Nicholas v Oliver, 36 N.H. 218; Davis v. Bank of Mobile, 12 Ala. 463; Alexander v. Sizer, L. R., Ex. 102; Sharpe v. Bellis, 61 Pa. St. 69; McIntire v. Preston, 5 Gilman, 48. See, also, Nichols v. Frothingham, 45 Me. 220; Bruce v. Lord, 1 Hilt. 247; Wright v. Boyd, 3 Barb. 523; Atlantic Mut. Fire Ins. Co. v. Young, 38 N. H. 451; Despatch Line, etc. v. Bellamy Manuf. Co., 12 id. 205.

[4] Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; Olcott v Tioga R. Co., 27 N. Y. 559; Bank of Utica v. Magher, 18 Johns. 341; Northampton Bank v. Pepoon, 11 Mass. 282; Farmers' Bank v. Haight, 3 Hill, 494; McWhorter v. Lewis, 4 Ala. 198; Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 124; Merchants' Bank v. Central Bank, 1 Kelly, 428; Ghent v. Adams, 2 id. 214; Mare v. Charles, 5 E. & B. 978; 34 Eng. L. & Eq. 138; Dewitt v. Walton, 5 Seld. 571; Hicks v. Hinde, 9 Barb. 528; Babcock v. Beman, 1 Kern. 200.

For a further consideration of personal liability of the agent in such cases, see *post*, § 210 *et seq*.

SEC. 199. **Ultra vires contracts by agents.**—We have already alluded to the familiar principle of law that a corporation cannot engage in any business, do any act, or enter into any contract not embraced within the scope of the powers conferred upon it. And it cannot, of course, confer upon its agents any authority or power which it does not itself possess. This doctrine rests upon the soundest principles; as otherwise acts might be done and obligations incurred, not only prejudicial to private rights, but inimical to the interests of the public. It follows, therefore, that contracts made by the agents of a corporation, that are beyond the powers of the corporation, and unauthorized by law, are usually null and void, in whosoever hands they may be.[1]

But we shall hereafter consider the doctrine of ultra vires more fully in a chapter on contracts.[2]

SEC. 200. If, under the English corporation acts, the law of its constitution or the constating instruments confer upon boards of directors the authority of acting for the corporation, or of managing its affairs, they still have no authority beyond that conferred upon the corporation, nor can they bind the corporation by any contract beyond the powers conferred on the corporate body which they represent as agents.[3] And where the power of making by-laws is in the corporate body, they may thereby limit the power of the directors; and the exercise of powers by

[1] Buffett *v.* Railroad Company, 40 N. Y. 168; Griggs *v.* Foote, 14 Allen, 195; Pearce *v.* Railroad Company, 21 How. 441; Miners' Ditch Company. *v.* Zellerbach, 37 Cal. 543; Marsh *v.* Fulton County, 10 Wall. 676; Thomas *v.* Richmond, 12 id. 349; Bridgeport *v.* Housatonic Railroad Company, 15 Conn. 475; Martin *v.* Mayor, etc., 1 Hill, 545; Overseers *v.* Mayor, etc., 18 Johns. 382; Donovan *v.* New York, 33 N. Y. 291; Seibrecht *v.* New Orleans, 12 La. Ann. 496; Clark *v.* Des Moines, 19 Ia. 199; Loker *v.* Brookline, 13 Pick. 343; Philadelphia *v.* Flanigen, 47 Pa. St. 21; Trustees *v.* Cherry, 8 Ohio St. 564; Hague *v.* Philadelphia, 48 Pa. St. 527; Albany *v.* Cunliff, 2 Comst. 165; Cuyler *v.* Rochester, 12 Wend. 165; Hodges *v.* Buffalo, 2 Denio, 110; Vincent *v.* Nantucket, 12 Cush. 103; Stetson *v.* Kempton, 13 Mass. 272; Parsons *v.* Inhabitants of Goshen, 11 Pick. 396; Spaulding *v.* Lowell, 23 id. 71; Mitchell *v.* Rockland, 45 Me. 496; S. C., 41 id. 363; Commissioners *v.* Cox, 6 Ind. 403; Smead *v.* Railroad Company, 11 id. 104; Brady *v.* Mayor, 20 N. Y. 312; Appleby *v.* Mayor, etc., 15 How. Pr. 428; Estep *v.* Keokuk County, 18 Ia. 199; Clark *v.* Polk County, 19 id. 248. And the defense ultra vires may be made though the corporate seal is attached. Leavenworth *v.* Rankin, 2 Kans. 358.

[2] See *post*, ch. 9.

[3] Fleckner *v.* United States Bank, 8 Wheat. 356; Ridgway *v.* Farmers' Bank, 12 S. & R 265; Salem Bank *v.* Gloucester Bank, 17 Mass. 29; Bank of Kentucky *v.* Schuylkill Bank, 1 Parsons' Sel. Cas. 227.

them beyond the power thus conferred, would also be ultra vires.[1]

SEC. 201. **Parties dealing with an agent must take notice of his authority.**— It is a fundamental principle of the law of agency, that the principal is bound only by the authorized acts of his agent. But this authority may be shown not only by a written instrument conferring the authority, or by a verbal authority where that is sufficient, but by the acts of the principal in holding the agent out to the world as having authority to act in the particular matter.[2] The distinction between general and special agents in respect to the notice which is required of parties dealing with them, is referred to by Mr. Parsons. He observes: "Of late years, courts seem more disposed to regard this distinction, and the rules founded upon it, as altogether subordinate to that principle which may be called the foundation of the law of agency, namely, that a principal is responsible either when he has given an agent sufficient authority or when he justifies a party dealing with his agent, in believing that he has given this agent this authority."[3]

SEC. 202. But the general doctrine in reference to corporate agents, whether general or special, is that parties dealing with them must take notice of such authority as is conferred upon them by the charter, organic act, articles of association or other constating instruments, and perhaps the by-laws adopted by the corporate body, in accordance with the organic or fundamental laws of its constitution, for such laws are supposed to be public; and all parties dealing with corporate agents are presumed to have notice of the same.[4] In a recent case where this question was involved, DANIELS, J., said: "The president is, at most, the agent of the company, created under a special legislative act defining the rights and privileges of the body, and the manner in which they should be enjoyed. This

[1] Id. See also Green's Brice's Ultra Vires, 607 *et seq.*

[2] COMSTOCK, J., in Mechanics' Bank *v.* New York, etc., R. Co., 3 Kern. 632.

[3] 1 Pars. on Cont. 44; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Chitty on Cont. (11th Am. ed.) 284; Story on Agency, § 17 *et seq.*

[4] Adriance *v.* Roome, 52 Barb. 399; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505; State *v.* Commercial Bank, 6 S. & M. 218.

the plaintiff is to be regarded as knowing. For all persons dealing with the officers or agents of corporations are bound to know that they act either under its charter or by-laws, or the usages which may be shown to exist defining the extent of their authority. They must, in doubtful cases, acquaint themselves with the extent of that authority, or otherwise submit to the consequences resulting from their omission to do that."[1]

SEC. 203. In support of this doctrine it is claimed that all persons may acquaint themselves with the general statutes of incorporation, and with the articles of association, or other instruments by which parties may associate and become incorporated under general statutes; that if they fail to acquaint themselves with them, and the authority of the corporate agents provided for by such acts, articles or constating instruments, it is their own fault; and if they give credit to any person not thereby authorized to act in reference to the particular matter, they must be content to look to the agent only, and cannot look to the company whom they represent.[2] Even a stranger who deals with a corporate agent is bound to take notice of such limitations of this authority as are contained in the organic or constating laws or instruments of the body corporate.

SEC. 204. **Delegation of authority by agents.** — In the extended and frequently complicated character of the business of many of our various modern corporations for pecuniary gain, it must almost necessarily follow, that authority is conferred upon various officers and agents, expressly or impliedly, to employ other agents and subagents. The objects of corporations would seldom be attained unless this power existed; and in a majority of cases it rests upon implication from the powers conferred upon a class of agents, or a particular agent of large powers and authority. We have already briefly alluded to this subject in treating of directors.[3] But a

[1] Risley *v.* Indiana, etc., R. Co., 1 Hun, 202. See, also, North River Bank *v.* Aymar, 3 Hill, 262; Mechanics' Bank *v.* New York, etc., R. Co, 13 N. Y. 599; McCullough *v.* Moss, 5 Denio, 567; Adriance *v.* Roome, 52 Barb. 399; Dabney *v.* Stevens, 40 How. Pr. 341; Salem Bank *v.* Gloucester, 17 Mass 1; Lowell Savings Bank *v.* Winchester, 8 Allen, 109.

[2] Earnest *v.* Nicholls, 6 H. L. 419; Smith *v.* Hull Glass Co., 11 C. B. 926; Ang. & Am. on Corp., §§ 41, 299, 591.

[3] See *ante*, ch. 6.

further consideration of it seems to be proper in this connection. It may be said that the power to delegate authority may be expressly provided for in the original appointment of the agent;[1] but in the various and complicated affairs of moneyed corporations this seldom occurs, and the right is usually, perhaps, left to be inferred from the nature and character of the agency.

Mr. Story, after affirming the general doctrine alluded to, observes: "But there are cases in which the authority may be implied, as when it is indispensable by the laws, in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode in which the particular business would or might be done.[2] Thus, if a person should order his goods to be sold by an agent at public auction, and the sale could only be made by a licensed auctioneer, the authority to substitute him in the agency, so far as the sale is concerned, would be implied.[3] So where, by the custom of trade, a ship broker, or other agent, is usually employed to procure a freight or charter-party for ships, seeking a freight, the master of such a ship, who is authorized to let the ship on freight, will incidentally have the authority to employ a broker, or agent for the owner, for this purpose. And the same principle will apply to a factor, where he is, by the usage of trade, authorized to delegate to another the authority to substitute another person to dispose of the property.[4] In short, the true doctrine, which is to be deduced from the decisions, is (and it is entirely coincident with the dictates of natural justice), that the authority is exclusively personal, unless from the language used, or from the fair presumptions growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent."[5]

[1] 1 Liv. on Agency, 54 *et seq.*; Commercial Bank *v.* Norton, 1 Hill, 505.

[2] Coles *v.* Trecothick, 9 Ves. 234 *et seq.*; 1 Bell's Com. 387 *et seq.*; 3 Chit. on Com. & Man. 206; Shipley *v.* Kymer, 1 M. & S. 484; Cockran *v.* Irlam, 2 M. & S. 301; Laussatt *v.* Lippincott, 6 S. & R. 386; Johnson *v.* Cunningham, 1 Ala. (N. S.) 249.

[3] Laussatt *v.* Lippincott, 6 S. & R. 386.

[4] Cockran *v.* Irlam, 2 M. & S. 301; Goswill *v.* Dankley, 1 Str. 680; Bromley *v.* Coxwell, 2 B. & P. 438; Gray *v.* Murray, 3 Johns. Ch. 167; Story on Agency, § 110.

[5] Story on Agency, § 14. See, also, 1 Bell's Com. 388, 482; Ersk. Inst., B. 3, tit. 3, § 34; 2 Kent's Com. 633 (4th ed.); 1 Domat, B. 1, tit. 16, § 3 of art. 2, 3; Cockran *v.* Irlam, 2 M. & S. 301; Catlin *v.* Bell, 4 Camp. 183.

SEC. 205. This doctrine of implied authority, from the nature and character of the agency, is peculiarly applicable to corporate agents. For, as corporations can only act by and through agents, it frequently occurs that some one must be appointed a general agent, by the corporate body or by the directors, to superintend a variety of matters, such as the superintendents of various matters connected with the operations of railroads and other corporations. And such appointment necessarily contemplates the appointment of sub-agents. It necessarily follows in such cases, that they have implied authority to appoint sub-agents for various purposes, and to remove the same at their will, and these sub-agents may in turn be authorized by express authority, or the requirements of the employment or business to employ other agents. The appointment in all these cases, if not directly authorized by the corporate body or board of directors, nor clearly to be inferred from the nature and character of the duties, business, or objects of the corporation, is at least generally ratified by the acts and conduct of the principal, in some manner, so as to make the appointment equally as valid for all purposes as though the authority originally emanated from the principal. We have already considered the implied authority of an agent, and the subject of ratification by the principal, in discussing the subject of directors.[1]

SEC. 206. **Powers expressly conferred by law.**—We have already alluded to the powers expressly conferred upon officers and agents by statute or by the fundamental law. In such cases they may exercise these powers unrestrained by the will of even the corporate body. The doctrine of authority to act within the scope of the authority is here as applicable, as where the appointment comes from the corporate body or other appointing power. But we have noticed the general principles applicable in such cases, as well as the doctrine of implied powers, and a further consideration of them in this connection is thereby rendered unnecessary.[2]

But no authority can be conferred in excess of that possessed by the corporate body, as such authority would be ultra vires, and any contract made by them in excess of such powers would be

[1] See *ante*, ch. 6; *post*, § 207.

[2] See *ante*, §§ 151, 152 *et seq.*

ultra vires and void. But we propose to consider the doctrine of ultra vires in another place.[1]

SEC. 207. **Ratification of acts of agents.**—The doctrine of ratification as applied to agency is that whereby the principal with full knowledge of the agent's acts, doings or omissions, approves and indorses the same, whereby he becomes bound by them, as though express authority had been originally conferred upon such agent in relation to the matters.[2] The general maxim is: *Omnis ratihabitio retrotrahitur, et mandato priori equiparatur.* Thus, if a contract is made by an agent acting for his principal, but without authority, but is subsequently ratified by the principal, this renders it valid so as to confer upon the other contracting party the same rights and remedies as if the authority therefor had originally been conferred upon the agent.[3] This ratification may be made in various ways. It is not essential that there be a positive and direct adoption of the acts, but such ratification may be inferred from the acts of the principal, and from the facts and circumstances of the case. If there is an express ratification or assent to an unauthorized act of an agent, there is no question of the application of the doctrine, and a contract made by such unauthorized agent thus ratified becomes obligatory on the part of the corporation as well as the other party.[4] But in most cases of this character the ratification becomes a matter of inference or implication from the acts and conduct of the principal.[5] And slight circumstances will sometimes be sufficient to warrant the conclusion of a ratification by the principal.[6] Thus, if the principal, when informed of a purchase by his agent in the name of the principal, merely complains of the manner in which the authority has been exercised, but does not deny the authority;[7]

[1] See *post*, ch. 9.

[2] Story on Agency, §§ 239, 445.

[3] Smith's Merc. L. 60; id. 108 (2d ed.); Story on Agency, § 445; Cook *v.* Tullis, 18 Wall. 332; Wood *v.* McCain, 7 Ala. 806; Taylor *v.* Robinson, 14 Cal. 396; McCracken *v.* San Francisco, 16 id. 591.

[4] Wilson *v.* Tumman, 6 M. & G. 236; Blood *v.* Goodrich, 9 Wend. 68; S. C., 12 id. 565; Harford *v.* M'Nair, 9 id. 57; Chitty on Com. and Man. 179; 1 Liv. on Agency, 45; Story on Agency, § 252.

[5] Terril *v.* Flower, 6 Mart. 584; Loraine *v.* Cartwright, 3 Wash. (C. C.) 151; Story on Agency, § 253.

[6] Paley on Agency, by Lloyd, 171; Conn. *v.* Penn., 1 Peters (C. C.), 496; Richmond Man. Co. *v.* Starks, 4 Mason, 296; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Rogers *v.* Kneeland, 13 Wend. 114.

[7] Johnson *v.* Jones, 4 Barb. 369.

or if an agent exceeds his authority in the purchase of goods, but the principal, with knowledge of the facts, receives the goods as his own without objection;[1] or if an agent sells goods contrary to his instructions but the principal afterward receives the proceeds with knowledge of the facts; and generally, where the principal receives the fruits of what has been acquired by the wrongful act of an agent, and does not restore it on being informed of the facts,[2] in these and similar cases the conduct of the principal would be considered as an indorsement and ratification of the agents' acts. It would be the duty of the principal in such cases to restore the fruit of the unauthorized contract, as soon at least as the facts came to his knowledge, and as far as possible place the other party in *statu quo*, otherwise he would be held liable on the contract.

SEC. 208. **The doctrine of ratification applicable to corporations.** — This doctrine is peculiarly applicable to corporations for pecuniary profit, and serves a valuable purpose in securing the ends of justice. We have already seen that the authority of agents of corporations may exist by the fundamental law of the institution, by the action of the corporate body or board of directors, by implication from the acts of the corporation, or be inferred from the office of the agent who assumes to act. In the case of private joint-stock corporations for pecuniary profit they usually require many agents and sub-agents. The appointment of these agents may be inferred, not only where there is no appointment under the corporate seal, but even where there is no actual record of their appointment. These, in their turn, may be authorized to appoint sub-agents, to make contracts in the name of the corporation. Proof of the authority to act may be difficult or impossible, except as it may be inferred from the acts of the body. If a sub-agent is employed, and his acts are recognized by the company, or if they receive the benefit of his contracts, knowing the facts, this, as we have seen, would be a ratification of the agency; and if it takes the benefit of a contract made by such an agent, it must take the same as made, with its disadvantages as well as ben-

[1] Ordiorne *v.* Maxcy, 13 Mass. 178; Clark *v.* Van Riemsdyk, 9 Cranch, 153.

[2] Willinks *v.* Hollingsworth, 6 Wheat. 241; Forrestier *v.* Bordman, 1 Story, 43; Palmerton *v.* Huxford, 4 Denio, 166. See, also, Fenn *v.* Harrison, 4 T. R. 177; Long *v.* Colburn, 11 Mass. 98.

efits to them, and they could not, under such circumstances, claim any benefit from portions of it in their favor, and reject it as to those matters imposing obligations upon it. It must accept the contract *in toto*, or not at all.[1]

SEC. 209. The general doctrine we have referred to is illustrated by a recent case, where the directors of a railroad company allowed its president to purchase locomotives and to operate the road with them, and generally to manage the affairs of the corporation in his discretion and without interference, but afterward resumed the management of the road themselves. This was held a sufficient ratification of the president's acts as to furnish evidence of the president's original authority to bind the corporation for the payment of bills issued by the president in payment of the locomotives.[2] And it is a generally recognized principle of the law of agency that where the principal neglects promptly to disavow the act of agency in case the agent has transcended his

[1] See Moss v. Averell, 10 N. Y. 449; Church v. Sterling, 16 Conn. 388; Chicago Building Soc. v. Crowell, 65 Ill. 453.

In Mayor v. Ray, 19 Wall. 468, HUNT, J., said: "It is a general rule applicable to all persons and corporations, and is a dictate of plain honesty, that whoever, knowing the facts of the case, retains and uses money received by an agent for his account, cannot repudiate the contract on which it is received." See, also, Story on Agency, § 239 *et seq.*; 1 Lind. on Part. (3d ed.) 273, 805; Downing v. Mt. Washington R. Co., 40 N. H. 230.

In Allegheny City v. McClurkan, 14 Pa. St. 81, COULTER, J., observes: "I take it for granted that it [the charter of the corporation] contains no express authority to the corporation to issue such notes as those embraced in this action. But it does not follow that the corporators are therefore not answerable for them in their corporate capacity. They have received value for them in their various public works and improvements erected and made in the city through their instrumentality, and it hardly comports well with fair dealing that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited agents and with their silent acquiescence."

[2] Olcott v. Tioga R. Co., 27 N. Y. 546. See, also, Cushing v. Loker, 2 Mass. 106; Episcopal Charit. Soc. v. Episcopal Church, 1 Pick. 372. And long acquiescence will amount to a presumption where it cannot otherwise be accounted for. Courcier v. Ritter, 4 Wash. (C. C.) 549; Erick v. Johnson, 6 Mass. 193; Amory v. Hamilton, 17 id. 103; Towle v. Stevenson, 1 Johns. Cas. 110; Pitts v. Shubert, 11 La. 288; Kingston v. Kincaid, 1 Wash. (C. C.) 455.

If the agency actually exists the acquiescence may well raise the presumption of a ratification. Courcier v. Ritter, 4 Wash. (C. C.) 549; Amory v. Hamilton, 17 Mass. 103; Erick v. Johnson, 6 id. 193; Fitzsimmons v Joslin, 21 Vt. 129; Johnson v. Jones, 4 Barb. 369; Pickett v. Pearsons, 17 Vt. 470; Salem Bank v. Gloucester, 17 Mass. 1; Payson v. Stoever, 2 Dill. 427

But where a director sells land to himself, a majority of a corporation cannot ratify the transaction so as to bind a minority. Cumberland Coal Co. v. Sherman, 30 Barb. 553. See, also, Martin v. Zellerbach, 38 Cal. 300.

authority, he makes it his own act, and this doctrine is as applicable to corporations as to natural persons.[1]

So it has been held that where the president of a railroad openly establishes and advertises tariffs for fare and freight on the road, and the company receives and appropriates the tolls thus received without objection, this amounts to a ratification.[2]

SEC. 210. **Personal liability of agents.** — It may be affirmed as a well-settled proposition of law, that persons, acting on behalf of others, must act, and give the parties with whom they are dealing to understand that they are acting as agents for another, or they will be liable as principals.[3] This rule is also as applicable to corporations as to private persons.[4] In regard to all written contracts made by agents of corporations, unless the contract in form binds the corporation, there is a personal liability of the agent.[5] "The difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he does this the principal is bound and the agent is not."[6]

[1] Kelsey v. National Bank, 69 Pa. St. 426; Bredin v. Dubarry, 14 S. & R. 30; Gordon v. Preston, 1 Watts, 387.

[2] Hilliard v. Goold, 34 N. H. 230; Pennsylvania, etc., R. Co. v. Dandridge, 8 G. & J. 248.

But a principal cannot ratify acts which do not come within the powers possessed by the corporation. Dill. on Corp., § 385 and note *a*. See further as to the doctrine of ratification, chapters on Directors and Contracts.

[3] Thompson v. Davenport, 2 Smith's Leading Cases (7th Am. ed.), 358; Story on Agency, § 266; Green's Brice's Ultra Vires, 630.

[4] Id. See, also, Paice v. Walker, L. R., 5 Ex. 173; Kay v. Johnson, 2 H. & M. 118; Barker v. Allan, 5 H. & N. 61; 29 L. J. Ex. 100; Haddon v. Ayers, 1 E. & E. 118; Hallett v. Dowdall, 18 Q. B. 2; 21 L. J. Q. B. 98; Story on Agency, § 147.

[5] Seaver v. Coburn, 10 Cush. 324; Pumpelly v. Phelps, 40 N. Y. 59; Lee v. M. E. Church, 52 Barb. 116; Dean v. Roesler, 1 Hilt. 420.

[6] See Gray, J., in Tucker Man. Co. v. Fairbanks, 98 Mass. 101. See, also, Dutton v. Marsh, L. R., 6 Q. B. 361; Lindus v. Melrose, 3 H. & N. 177; 27 L. J. Ex. 336; Alexander v. Sizer, L. R., 4 Ex. 102; Carpenter v. Farnsworth, 106 Mass. 561; Nichols v. Frothingham, 45 Me. 220; Nicholas v. Oliver, 36 N. H. 218; Slawson v. Loring, 5 Allen, 340; Draper v. Massachusetts, etc., Co., id. 338; Sharpe v. Bellis, 61 Pa. St. 69; Means v. Swormstedt, 32 Ind. 87. But in Sherman v. N. Y. Cent. R. Co., 22 Barb. 239, the contract was so drawn as to bind neither the principal nor agent.

SEC. 211. It is difficult to furnish any general rule as to what is requisite in the form of an instrument to bind the principal and when for the want of sufficient form and substance in the contract to bind the principal the agent is personally liable. But in such cases the general rule is, that if the principal is bound, the agent is not, and if the agent is bound, the principal is not.[1]

SEC. 212. Where the name of the principal appears in the body of the instrument, and to the signature of the party acting there is annexed the word "agent," this would be clearly the instrument of the principal, and bind him, and not the agent. And it has been held that even the name of the corporation printed upon the margin of the instrument, though it did not appear in the body of the same, was sufficient.[2] So, it was held where a note was made payable to one as an officer, as for instance, to "A. B., treasurer," and he indorsed it in the same way, this created no personal liability.[3] So, it is held that a bill drawn to "A. B., cashier," is a bill payable to the bank of which he is cashier, and that an indorsement in the same form is an official indorsement, and does not make him personally liable. In such a case in New York, WRIGHT, J., observes: "Had there been nothing in the case to connect the bill with the defendant's bank, the cashier would have been regarded as the payee and indorser individually, and the abbreviation affixed to his name would have been regarded as *descriptio personæ;* but when his official position is shown, connected with the fact that the bill was the property of the bank, and in the regular course of business was transmitted to its agent for collection, it is then shown that the indorsement is an official one."[4]

[1] Abbey *v.* Chase, 6 Cush. 54; Ellis *v.* Pulsifer, 4 Allen, 165.

[2] Fuller *v.* Hooper, 3 Gray, 334; Slawson *v.* Loring, 5 Allen, 340; Mott *v.* Hicks, 1 Cow. 514; Carpenter *v.* Farnsworth, 106 Mass. 561.

[3] Babcock *v.* Beman, 1 E. D. Smith, 597; S. C., 11 N. Y. 200. See, also, as to the distinction made between an agent as indorser and acceptor, Babcock *v.* Beman, *supra;* Bruce *v.* Lord, 1 Hilt. 247.

[4] Bank of New York *v.* Bank of Ohio, 29 N. Y. 619. See as to the admissibility of parol evidence to show the liability of the bank in such cases, Olcott *v.* Tioga, etc., R. Co., 27 N. Y. 546; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Elwell *v.* Dodge, 33 Barb. 330; Thompson *v.* Tioga, etc., R. Co., 36 id. 79; Merchants' Bank *v.* McCall, 6 Bosw. 473; Mott *v.* Hicks, 1 Cow. 514; Brockway *v.* Allen, 17 Wend. 40; Bruce *v.* Lord, 1 Hilt. 247. But see, also, Bank of New York *v.* Farmers' Bank, 36 Barb. 332, where it was held that an indorsement of a note by the cashier did not render the bank liable as indorsee.

SEC. 213. But on the other hand, where the name of the principal is not named in the body of the instrument, but it runs in the name of the agent, and is merely signed by him, with the addition "agent," or "agent for The Churchman," or the like addition, this addition will usually be treated as merely *descriptio personæ*, and surplusage, and the agent held as personally liable.[1] So, a bill of exchange drawn on an insurance company by their agents, in which they say, "charge the same to account of David Fairbanks & Co., Ag'ts, Piscataqua F. & M. Ins. Co.," binds F. & Co. personally as drawers, although delivered by the agents of the Piscataqua Fire and Marine Insurance Company, in payment of a loss on one of its policies.[2] So, in England it was held that where four directors of a joint-stock company signed their names to a promissory note, as follows: "We, the directors of the Isle of Man Slate Company, do promise to pay," etc., and on one corner of the note was the company's seal; still it was held that the directors were personally liable as makers of the note.[3]

SEC. 214. **When there is no principal.**—In case a person assumes to act as agent for a person as principal, when there is in fact no such person in existence, the person thus assuming to be principal would clearly be personally liable, as he would be held to have acted on his own behalf, although by the form of the instrument he professes to act as agent.[4] Mr. Story observes, that "persons contracting as agents are nevertheless ordinarily, although, as we shall presently see, not universally held personally responsible, where there is no other responsible principal to whom resort can be had."[5] And in England it is held that if the 'promoters' of a corporation make on behalf of the future corporation an absolute contract, and not merely one that is conditional on the future completion of the organization, they will not be relieved from personal liability, even though the corporation when organized adopts the contract.[6]

[1] Stackpole *v.* Arnold, 11 Mass. 27; Slawson *v.* Loring, 5 Allen, 340; Moss *v.* Livingston, 4 N. Y. 208; De Witt *v.* Walton, 9 id. 571; McClure *v.* Bennett, 1 Blackf. 189; Titus *v.* Kyle, 10 Ohio St. 444.

[2] Tucker Man. Co. *v.* Fairbanks, 98 Mass. 101.

[3] Dutton *v.* Marsh, L. R., 6 Q. B. 361.

[4] Kelner *v.* Baxter, L. R., 2 C. P. 174; Story on Agency, §§ 287, 290, 274; Paley on Agency, by Lloyd, 374; 2 Kent's Com. 630.

[5] Story on Agency, § 280.

[6] Kelner *v.* Baxter, L. R., 2 C. P. 174. See, also, Doubleday *v.* Muskett, 7 Bing. 110.

But this doctrine does not apply where the agent had authority to act for his principal, and where the agent acts in entire good faith, but without the knowledge of either party, who have equal means of ascertaining the fact, the principal has died.[1] In such a case, as either party has equal means of ascertaining the fact, they are supposed to contract with reference to that contingency, and the agent does not thereby become personally liable.

SEC. 215. **Liability of the agent in case of misrepresentation of his authority.** — In case of the misrepresentation by the agent of his authority, which he assumes to exercise, by which he secures the execution of a contract between the corporation which he assumes to represent and another party, and said contract is ultra vires, or for any cause not enforceable against said corporation, and the party with whom it is made is not aware of the limitations of the agent's authority, such agent will be individually liable on such contract. And this doctrine has, in England, been held to apply, however innocent the agent, provided the principal fails to ratify it.[2]

SEC. 216. He may also be held personally liable on the ground of fraud and misrepresentation, or of implied warranty. The doctrine of the supreme court of New York on this question is thus stated: "Whenever a person enters into a contract as the agent of another, he warrants his own authority, unless very special circumstances or express agreement relieve him from that responsibility. An action upon such warranty must always be appropriate where personal liability attaches to an agent, in consequence of his contracting without authority. * * * If the act of the agent were fraudulent, an action for the deceit would lie, but it would be a concurrent remedy with the action on the contract itself, if the cases which sustain such action can be regarded as correctly decided."[3]

SEC. 217. Where one acts as agent for another through his

[1] Story on Agency, § 265a, and note; Smout v. Ilbery, 10 M. & W. 1.

[2] Collen v. Wright, 8 E. & B. 647; 27 L. J. Q. B. 215; Wilson v. Miers, 10 C. B. (N. S.) 348; Slim v. Croucher, 1 D. G. F. & J. 518; Edmunds v. Bushnell, L. R., 1 Q. B. 97.

[3] White v. Madison, 26 N. Y. 117. See, also, Dung v. Parker, 52 id. 494; Baltzen v. Nicolay, 53 id. 467.

culpable ignorance, though in fact supposing that he has authority, he is still liable, as for a deceit.[1]

Mr. Justice SHAW, on this subject, thus expresses his views: "If one falsely represents that he has authority, by which another relying on the representation is misled, he is liable; and by acting as agent for another, when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty and he is liable. But in both cases the liability is founded on the ground of deceit, and the remedy is by the action of tort."[2]

If the agent believes he has authority, when he has none, but affirms that he has, when in fact he has not such authority, and thereby induces another to enter into a contract with the agent, on behalf of the principal, it is perhaps entirely just that he should be responsible to the party with whom he deals, for the consequences of his mistake, and that he should rather suffer than the other party, on the principle that where two innocent parties must suffer a loss, the party ought to bear it who was the immediate and active cause of it.[3]

"There is no doubt," observes Baron ALDERSON, "that in the case of a fraudulent misrepresentation of his authority, with an intent to deceive, the agent would be personally responsible. But

[1] Noyes v. Loring, 55 Me. 408; McCurdy v. Rogers, 21 Wis. 197; Bartlett v. Tucker, 104 Mass. 336; Ogden v. Raymond, 22 Conn. 379; Taylor v. Shelton, 30 id. 128; Duncan v. Niles, 32 Ill. 532; Walker v. Bank of New York, 9 N. Y. 582; Ballou v. Talbot, 16 Mass. 461; Abbey v. Chase, 6 Cush. 54; Draper v. Massachusetts Steam Heating Co., 5 Allen, 338.

[2] Jefts v. York, 10 Cush. 392; Hegeman v. Johnson, 35 Barb. 200. See, also, M. & W. 1; Jenkins v. Hutchinson, 13 Ad. & El. (N. S.) 744.

In reference to the form of the action in such cases, there seems to be some diversity of opinion. In England it has been held that it should be by special action on the case. This doctrine has also been maintained in Massachusetts. Long v. Colburn, 11 Mass. 97; Ballou v. Talbot, 16 id. 461. See, also, in Pennsylvania, in Hopkins v. Mehaffy, 11 S. & R. 129.

On the other hand it has been held in New York, that an action may be maintained upon the instrument thus executed by the agent, as though it were his personal contract. Dusenbury v. Ellis, 3 Johns. Cas. 70; White v. Skinner, 13 Johns. 307; Meech v. Smith, 7 Wend. 315; Cunningham v. Soules, id. 106; Stetson v. Patten, 2 Gr. 358; 2 Kent's Com. 631; Clay v. Oakley, 5 Mart. (La.) 138; Perkins v. Washington Ins. Co., 4 Cow. 469; Feeter v. Heath, 11 Wend. 477; White v. Skinner, 13 Johns. 307; Lazarus v. Shearer, 2 Ala. (N. S.) 718; Hampton v. Speckenagle, 9 S. & R. 212, where it was held that an agent in purchasing goods exceeded his authority, he might be treated as the purchaser.

[3] Smout v. Ilbery, 10 M. & W. 1; Baring v. Corrie, 2 B. & A. 143; Paley on Agency, by Lloyd, 201; Story on Agency, §§ 56, 264, and notes.

independently of this, which is perfectly free from doubt, there seems to be still two other classes of cases in which an agent, who, without authority, makes a contract in the name of his principal is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract, as having such authority. In that case on the plainest principles of justice he is liable, for he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just that he who does so should be considered as holding himself out as one having competent authority to contract and as guaranteeing the consequences arising from any want of such authority. But there is a third class in which the courts have held that, where a party making the contract as agent, *bona fide* believes that such authority is vested in him, but he has in fact no such authority, he is still personally liable."[1]

But an agent, it is held, cannot be liable, either in contract or tort, for falsely misrepresenting his authority, to make contracts on behalf of another, where the principal would not be bound by the contract entered into, on the ground that it is void by the statute of frauds.[2]

SEC. 218. **Matters of which parties dealing with agents are bound to take notice.** — An agent will not be personally liable, where he exceeds his authority, if the person knew or had equal means of knowing that he was exceeding his authority. Where the authority of the officers or agents who assume to act for a corporation is provided for by statute, or the acts under which it is organized, or by the fundamental law, or by the constating instruments of the corporation, all persons dealing with such officers or agents, as we have before observed, are bound to take notice of such provisions.

[1] Smout *v.* Ilbery, 10 M. & W. 1. In this case the decision turned upon another question. A man, who was in the habit of purchasing meal of the plaintiff for his house, went abroad leaving his wife and family resident in England, and died abroad. Meal was supplied after the death of the husband, which was unknown to both the wife and the plaintiff. Suit was brought against the wife for the meal thus furnished. It was held that the wife was not liable. See, also, Blades *v.* Free, 9 B. & C. 167; Story on Agency, §§ 265, 265a; Hegeman *v.* Johnson, 35 Barb. 200.

[2] Dung *v.* Parker, 52 N. Y. 494; Baltzen *v.* Nicolay, 53 id. 467.

They have the means of knowing, and are supposed to know the extent of the power of such agents, and having at least constructive notice of the same, cannot consistently claim that they were deceived by any implied representations, or even by the express warranty of the agent with whom they deal, of the power of the corporation as it would be shown by such provisions; and hence he could not hold the agent personally liable in such cases.[1]

SEC. 219. All parties dealing with corporate agents are bound to take notice of acts of the agent that are ultra vires; for the powers of the agent cannot exceed those of the principal; and the powers of the corporation, as we have seen, are matters of public knowledge, or capable of ascertainment.[2] So an undertaking on the part of an agent for a corporation, that some act shall be done which is contrary to the public law, or against public policy, would be void, and of this the contracting parties would be required to take notice; and in such cases there could be no recovery against the agent.[3] For, as no contract prohibited by the charter or the general laws of the state, can be made by a corporation, it is evident that the agent could not make such a contract. And of this prohibition parties dealing with agents would be required to take notice.[4]

SEC. 220. **Liability of agents for violation of duties.** — It is a general doctrine of the common law that agents are personally liable to their principal for all violation of their duty and obligations to their principals. These violations may consist either of positive misconduct or of acts of negligence or omissions of their

[1] Ellis *v.* Coleman, 25 Beav. 662; 27 L. J. Ch. 611; Macgregor *v.* Dover, etc., R. Co., 18 Q. B. 618; 22 L. J. Q. B. 69; Kerr on Frauds (Am. ed.), 90; Pitcher *v.* Hennessy, 48 N. Y. 415; Benj. on Sales (Am. ed.), § 414 *et seq.*

And if the agent may be excused from liability in certain cases where the facts relating to the agency are known or may be presumed to be known by both parties, it is evident that the rule would apply with even greater force where the agent has been induced to act on his supposed agency, on the representations of the party with whom he is dealing. Aspenwall *v.* Torrence, 1 Lans. 381.

[2] Green's Brice's Ultra Vires, 639 *et seq.*

[3] Macgregor *v.* Deal R. Co., 18 Q. B. 618; 22 L. J. Q. B. 69; Mayor, etc. *v.* Norfolk R. Co., 4 E. & B. 397; Green's Brice's Ultra Vires, 231.

[4] Dill on Corp., § 372. See, also, Thomas *v.* Richmond, 12 Wall. 349; Marsh *v.* Fulton, 10 id. 676; Leavenworth *v.* Rankin, 2 Kans. 357; Horn *v.* Baltimore, 30 Md. 218; Bridgeport *v.* Railroad Co., 15 Conn. 475; Haynes *v.* Covington, 13 S. & M. 408; Taft *v.* Pittsford, 28 Vt. 286; Branham *v.* San Jose, 24 Cal. 602; Wallace *v.* San Jose 29 id. 180; State *v.* Kirkley, 29 Md. 85; State *v.* Haskell, 20 Ia. 276.

duty. And in such cases the suit must generally be brought in the name of the corporation and not in the name of a stockholder; as he is the agent of the corporation and not of the individual corporators, and the injury thereby sustained must be considered an injury to the corporate body, of which he is agent[1]

SEC. 221. **Compensation of officers and agents.** — The compensation of officers is usually fixed by the provisions of the by-laws; but in the absence of such provisions or any express contract, they may generally recover so much as their services are reasonably worth.[2] Or compensation may depend upon usage or custom.[3] Where, however, there is not only no compensation provided for officers, but all allowance for compensation of them is prohibited by the organic or by-laws of the corporation, no compensation can be allowed.

It is common, perhaps, to make no provision for the compensation of directors as such, and it has been held that they, in such cases, could not recover for such services.[4]

The right of directors and perhaps some other officers of private corporations, to recover on a *quantum meruit*, has been questioned; and in Pennsylvania and some other states it has been held that there must be an express contract for compensation of its officers, or they cannot recover;[5] and this is the universal rule in relation to officers of municipal corporations.[6]

[1] Smith *v.* Poor, 40 Me. 415; Hersey *v.* Veazie, 24 id. 12; Hodges *v.* New Eng. Screw Co., 1 R. I. 312; Smith *v.* Hurd, 12 Metc. 371; Abbott *v.* Merriam, 8 Cush. 588; Bayless *v.* Orne, 1 Freem. (Miss.) Ch. 175; Austin *v.* Daniels, 4 Den. 301; Brown *v.* Vandyke, 4 Halst. Ch. 795; Denny *v.* Manhattan Co., 2 Den. 115; S. C., 5 id. 639; Franklin Ins. Co. *v.* Jenkins, 3 Wend. 130; Lexington R. Co. *v.* Bidges, 7 B. Monr. 559; Salem *v.* Richardson, 30 Conn. 360; Calhoun *v.* Richardson, 30 id. 229; Richardson *v.* Williamson, L. R., 6 Q. B. 276; Weeks *v.* Propert, L. R., 8 C. P. 427; Mabey *v.* Austin, L. R., 3 Q. B. 299; Peck *v.* Gurney, L. R., H. L. 377.

But see chs. 6 and 14 where cases will be found showing personal liability of agents and the right of stockholders to sue them in certain cases.

[2] Commonwealth Ins. Co. *v.* Crane, 6 Metc. 64; Waller *v.* Bank of Kentucky, 3 J. J. Marsh. 206; Elwes *v.* Ogle, 2 Eng. L. & Eq. 379; Bill *v.* Darenth, etc., R. Co., 1 H. & N. 305; 37 Eng. L. & Eq. 539; East Anglican R. Co. *v.* Lythgoe, 10 C. B. 726.

[3] Fraylor *v.* Sonora Mining Co., 17 Cal. 594.

[4] New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170; Loan Association *v.* Stonemetz, 29 Pa. St. 534; Hodges *v.* Rutland R. Co., 29 Vt. 220; Chandler *v.* Monmouth, 1 Green (N. J.), 255.

[5] Kilpatrick *v.* Penrose Ferry, etc., Co., 49 Pa. St. 118. See, also, Schackelford *v.* New Orleans R. Co., 37 Miss. 202; Henry *v.* Rutland R. Co., 27 Vt. 435.

[6] Sikes *v.* Hatfield, 13 Gray, 347; Barton *v.* New Orleans, 16 La. Ann. 317; Garnier *v.* St. Louis, 37 Mo. 554; Philadelphia *v.* Given, 60 Pa. St. 136; Meagher *v.* County, 5 Nev. 244; Baker

a public or private law by the legislature, is void, as prejudicial to sound legislation and against public policy.[1]

a suit at law can be maintained to recover of the corporation the value of these services. As before observed, the English cases referred to are bills in equity, and the reasoning of the courts tends to exclude the idea of suits at law. See, especially, Edwards *v.* Grand Junction Railway, 1 Mylne & Cr. 650. Where, however, the charter provided that the cost of obtaining it should be paid out of the first sums subscribed, it was held that debt would lie against the corporation by an attorney, who had solicited and obtained the charter, to recover for the costs, charges, and expenses. Tilson *et al. v.* Warwick Gas-Light Co., 4 B. & C. 962. See Chitty on Cont. 250, and cases cited.

"In the case above cited, one count of the declaration was special, setting out the statute, and there were other counts for work and labor, and the court were inclined to hold that a recovery might be had on either count. In Hall *v.* Vt. & Mass. Railw. Co., 28 Vt. 401, it was decided that a suit at law against a corporation would lie to recover for the services of the plaintiff in attending various meetings of the corporation after the charter, and before the organization, he having been one of the original corporators under the charter, by which subscriptions for five thousand shares were necessary before an organization could be perfected. The court held that the duty rested upon the corporators to do whatever was required by the charter to effect that result; that, although the corporation might not be vested with full corporate powers, yet it was *in esse*, and had an inchoate existence, and the corporators had the power, and were so far the agents of the corporation as to bind them by any act which they were required to do, or which was necessary to perfect their organization under the charter; and the court held, that, under the circumstances, a promise to pay was implied. That was an action of book debt, and is an express authority, that, in Vermont, a suit at law may be maintained; and it will be observed that in the case before us the corporation was chartered by the legislature of that state, and the road there located and built.

"Under these circumstances, we think that the contract must be regarded as made in Vermont, and there to be executed; and, therefore, in its nature, validity, and interpretation, to be governed by the laws of Vermont; while, in respect to the form of the remedy, it is to be governed by our own laws. Dyer *v.* Hunt *et al.*, 5 N. H. 401; Stevens *v.* Norris, 30 id. 466; 2 Kent's Com. 462.

"It may then safely be assumed, that, under the laws of Vermont, the corporation is liable in some form for services necessary to perfect its organization, and which, when such organization was perfected, it accepted and enjoyed the benefits arising therefrom. Such would be the case in respect to services in obtaining subscriptions to the capital stock, rendered by a corporator or associate, and which subscriptions were after the organization accepted by the corporation. Of course, to entitle the plaintiff to recover, such services must have been necessary and reasonable, and rendered not gratuitously, but with the understanding and expectation that they were to be paid for.

"The question, then, is whether an action at law can be sustained in New Hampshire to enforce such claim; or whether resort can be had to equity alone. The objection to a recovery in a suit at law is purely technical, but it must, nevertheless, prevail if it be well founded. We are inclined to think, however, that it is no violation of settled principles to hold that a suit

[1] Powers *v.* Skinner, 34 Vt. 274. In this case KELLOGG, J., observes:

"Courts of justice have, with jealous care, endeavored to protect the legislation of the government from all illegitimate and sinister influences and agencies; and it has been settled by a series of decisions, uniform in their reason, spirit, and tendency, that an agreement in respect to services as a lobby-agent, or for the sale by an individual of his personal influence and solicitations, to procure the passage of a public or private law by the legis-

SEC. 222. If the amount of salary of officers is fixed by the charter or other fundamental law, allowance in excess of such

at law may be maintained to enforce the obligation to pay for services rendered in the manner described, and of which the corporation, after its full organization, has taken the benefit. If it were true, that, at the time the services were rendered, the corporation had no capacity to make a contract,— which is by no means clear after the charter has been accepted,— still, if the services were rendered for the corporation upon the promise of the corporators that they should be paid for by it when its organization was perfected, and after that the corporation had adopted the contract and received its benefits, we think, that, upon the maxim that a subsequent ratification is equivalent to a prior request, it may well be held that a promise to pay will be implied. Upon this principle, a person may sue on a contract made in his name by one assuming to have authority, but having none in fact. So the title of an administrator will relate back to the death of the intestate, so as to entitle him to sue for the price of goods sold by one assuming to act for the administrator, whoever might be afterward appointed,— Broom's Legal Maxims (676), and cases cited,—and still at the time of such sale there was no one in existence having capacity to make a contract as administrator. See, also, Foster *v.* Bates, 12 M & W. 226. So, if one without authority buy goods for another, but afterward the other receives them, this is equivalent to a previous request. 1 Wms. Saund. 264, n. 1; Broom's Legal Maxims (596); Story on Agency, §§ 244, 250; Keyser *v.* School District, 35 N. H. 481, 482."

lature, is void as being prejudicial to sound legislation, manifestly injurious to the interests of the state, and in express and unquestionable contravention of public policy. Clippinger *v.* Hepbaugh, 5 Watts & Serg. (Pa.) 315; Wood *v.* McCann, 6 Dana (Ky.), 366; Marshall *v.* Balt. & Ohio Railw. Co., 16 Howard (U. S. Sup. Ct.), 314; Harris *v.* Roof's Ex'rs, 10 Barb. (Sup. Ct.) 489; Rose *et al.* *v.* Truax, 21 id. 361; Bryan *v.* Reynolds, 5 Wis. 200. The principle of these decisions has no respect to the equities between the parties, but is controlled solely by the tendency of the contract; and it matters not that nothing improper was done, or was expected to be done, under it. The law will not concede to any man, however honest he may be, the privilege of making a contract which it would not recognize when made by designing and corrupt men. A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for, and receive, pay for his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing and making an oral or written argument, provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot with propriety be employed to exert his personal influence, whether it be great or little, with individual members, or to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. The personal and private nature of the services to be rendered is the point of illegality in this class of cases. Sedgwick *v.* Stanton, 14 N. Y. (4 Kern.) 289. Our government, in theory, is founded on the most exalted public virtue, and the principle which forbids the legal recognition of any contract for such services is so essential to the purity of the government, and is so firmly established as a rule of public policy, that it requires no vindication. It has not been questioned by counsel in argument, and no member of the court has had any doubt in respect to its propriety, or any hesitation in recognizing its authority. It is equally well settled that where a contract is an entire one, and contains an element which is legal, and one which is void as being against public policy, it cannot be sifted, so that the legal service rendered under it, or in its pursuit, can be separated from the illegal service, and a recovery had for so much of the service as would, if considered by itself, be adjudged to be legal. If

salary cannot be made by the corporation or the board of directors.[1]

But the subject of compensation of directors we have already considered.[2]

SEC. 223. **Frauds of officers and agents.** — We shall hereafter consider the liability of corporations for the frauds and other torts of their officers and agents, merely premising here that in such cases the liability of the corporation is the same, in the absence of express provision of the law on the subject to the contrary, as would be the liability of a natural person under similar circumstances, the general principle being that they are liable in damages for frauds and misrepresentations of their agents perpetrated and made in the due course of their employment, and for such torts as occur by their permission or express direction.[3]

SEC. 224. **Proof of agency.** — From what has been said in reference to corporate acts, either by the corporate body, or by the directors, it will be apparent that the best evidence of appointment of an agent and his authority to act is the books of the company containing the entry of the resolution or act of appointment.[4] As the secretary of the corporation would ordinarily be

any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained on it. Chitty on Contracts, 536, c.; Filson's Trustee *v.* Himes, 5 Pa. 452; Rose *et al.* *v.* Truax, *ubi supra.*"

In the case of Revere *v.* The Boston Copper Co., 15 Pick. 351, it was held, that a corporation having made a contract with the plaintiff to serve its interests during his life, and promised in consideration thereof the payment of a fixed salary, so long as the service continued to be faithfully performed, cannot relieve itself from its responsibility by voting the dissolution of the corporation, transferring its property to trustees for the purpose of closing up its concerns, and giving notice to the executive authority of the state that it claims no further interest in its act of incorporation.

If this is attempted the plaintiff is thereby released from his obligation to serve the corporation, and is entitled to an indemnity for the loss which he has sustained in consequence of the refusal of the company to employ him and pay the stipulated salary.

[1] Carr *v.* City of St. Louis, 9 Mo. 191. See, also, Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; Godbold *v.* Bank of Mobile, 11 Ala. 191; Carr *v.* Chartier's Coal Co., 25 Pa. St. 337; St. Luke's Church *v.* Mathews, 4 Des. Ch. 578.

[2] See *ante*, ch. 6.

[3] See *post*, ch. 13.

[4] Thayer *v.* Middlesex Ins. Co., 10 Pick. 326; Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. 282; Clark *v.* Benton Manuf. Co., 15 Wend. 256; Haven *v.* New Hampshire Asylum, 13 N. H. 532; Orwigs *v.* Speed, 5 Wheat. 420; Methodist Chappel Co. *v.* Herrick, 25 Me. 354; Ang. & Am. on Corp. § 283.

the proper custodian of the books and records of the corporation, he would be the proper person to prove the records to be those of the corporation, which would be necessary in order to use the same as evidence of the matters therein contained.[1] But we have already considered the effect of the recognition of the agent's acts by the directors or the corporate body, as by accepting of the results or fruits of his agency, and as furnishing evidence of his agency.

The principles of evidence applicable to the proof of agency, generally, would be equally applicable where it is claimed that a corporation is the principal.

[1] Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 478.

But as we have already noticed, proof of appointment of the agent may be inferred from corporate acts. See *ante*, § 162.

CHAPTER VIII.

CORPORATE MEETINGS.

SEC. 226. **How the will of the corporate body is expressed.** — It will be evident, from what has been already said, that the will of the corporation, it being only an artificial and ideal body, can only be expressed by the corporators or other persons composing it. In order to secure an expression of this will, when necessary, a meeting of the corporators would ordinarily be the most convenient. At all such meetings the members should have an opportunity to be present, and a right to a voice or vote on any question of corporate policy or action, in the absence of any limitation of this right in the constitution of the corporate body; the general rule being, that the will of the majority is the will of the corporate body.[1] This doctrine applies, not only in reference to the

[1] McBride *v.* Porter, 17 Ia. 203; Ang. & Am. on Corp., § 499; 2 Kent's Com. 293; St. Mary's Church, etc., 7 S. & R. 517; Keyser *v.* Stansifer, 6 Ohio, 363.

adoption of by-laws, for the general management of its concerns, including the mode of appointment or election of officers and agents, and the granting of special or general powers to them, but the right to direct the management, in general, of the affairs of the corporation. They may, in case there is no limitation of power in the organic law, determine, by the vote of the majority, all questions of policy that come within the general scope of the power conferred upon the corporation. They may prescribe the times of meetings, general or special, the manner of giving and the time of notice required to be given to the members, provide for the election of officers, agents and managers, and prescribe the authority they possess, the duties imposed upon them, and the mode of performing them. If a person signs articles of association, which is required under the general incorporating statutes of most of the states to effect an incorporation, or constitutes himself a member subsequently, by a purchase of its stock, it is with the understanding that, in case no other provision is made, he will, in the management of its affairs, submit to the will of the majority; the fundamental principle being, "that no one shall be bound without his own consent, expressed by himself or his representative; but actual assent is immaterial, the assent of the majority being the assent of all: this is not only constructively but actually true; for that the will of the majority shall in all cases be taken for the will of the whole is an implied but essential stipulation in every compact of the sort; so that every individual who becomes a member, assents beforehand, to all measures that shall be sanctioned by a majority of the voices." [1]

SEC. 227. **Notice of corporate meetings.** — In order to secure an expression of the will of the members of a corporation, in relation to various matters of concern to it, it is usually necessary to have meetings of the members. And at all meetings the members have a right to be present, and give an expression to their views

[1] GIBSON, J., in *Re* St. Mary's Church in Philadelphia, 7 S. & R. 517; Congregation *v.* Johnston, 1 id. 9; 1 Kyd on Corp. 422; 2 Kent's Com. 286; Dudley *v.* Kentucky High S., 9 Bush, 576; Mowrey *v.* Ind. C. R. Co., 4 Biss. 78; Troy & Rutland R. Co. *v.* Kerr, 17 Barb. 581; Horton *v.* Baptist Church, 34 Vt. 316; Lauman *v.* Lebanon R. Co., 30 Pa. St. 46; East Tenn. R. Co. *v.* Gammon, 5 Sneed, 567; Gifford *v.* N. J. R. Co., 2 Stockt. 172; Black *v.* Delaware, etc., R. Co., 7 C. E. Green, 130.

and judgment as to corporate action and policy, and to enforce them by their vote, unless restrained by the provisions of the articles of association, express or implied. In order, therefore, to secure such an expression of views, some notice is usually required by the organic law or the by-laws of the association, to be given to the members composing it; and in the absence of any provisions in reference to notice, the general principles of the common law would probably require reasonable personal notice to be given.[1] And even by-laws, relating to notice, which are repugnant to the fundamental laws of its constitution, will be considered as void.[2] The failure to give the notice required will generally invalidate a corporate meeting.[3] And it is held to be a plain dictate of reason, that no function intrusted to, or existing in a number of persons, can be rightfully or lawfully exercised without a reasonable notice to all the members composing the body.[4]

If the articles of association or by-laws provide for the times and places of holding meetings, it would, undoubtedly, be the duty of members to take notice of the same; and if they prescribe the notice to be given, such notice as required as to the time and mode of service may undoubtedly be given, and this would be all that could be required.[5]

[1] Rex v. Langhorn, 4 A. & E. 538; People v. Batchelor, 22 N. Y. 128; People's Ins. Co. v. Wescott, 14 Gray, 440; State v. Ferguson, 2 Vroom, 107.

[2] Tucker v. Rex, 2 Bro. P. C. 304; Hoblyn v. Rex, id. 329. See, also, Rex v. Attwood, 4 B. & Ad. 481; N. M. 286; Rex v. Westwood, 7 Bing. 1; 4 B. & C. 781; Rex v. Bird, 13 East, 367; Green v. Durham, 1 Burr, 127.

[3] Rex v. Chetwynd, 7 B. & C. 695; Moore v. Hammond, 6 id. 455.

As to notice of adjourned meetings required to be given to those who attend the original one, see Wills v. Murry, 4 Ex. 843; Warner v. Mower, 11 Vt. 385.

[4] People v. Batchelor, 22 N. Y. 128; People's Ins. Co. v. Westcott, 14 Gray, 440; 1 Redf. on Rail., § 20.

And the absence of a member from home will not, ordinarily, excuse a want of notice. Jackson v. Hampden, 20 Me. 37. But it has been held that the mental imbecility of a member will not render the proceedings of a corporate meeting invalid on account of a want of notice to him. Stebbins v. Merritt, 10 Cush. 27. The pledgee of stock is not generally entitled to notice. McDaniels v. Flower Brook Man. Co., 22 Vt. 274. Where, by the records of a meeting, it appeared that a majority of the directors were present, it was held that it would be presumed that all had requisite notice. Sargent v. Webster, 13 Metc. 497; Lane v. Brainerd, 30 Conn. 565. Nor can the validity of the acts of directors be collaterally questioned on the ground of a want of notice. Chamberlain v. Painesville, etc., R. Co., 15 Ohio St. 225. See, also, Dill. on Corp., §§ 200-225.

[5] People v. Batchelor, 22 N. Y. 128; Ang. & Am. on Corp., § 488.

The time and place of meeting it is claimed may be fixed by usage, a tacit understanding of the members, or in other ways, of which members may be required to take notice. Atlantic Ins. Co. v. Sanders, 36 N. H. 252.

SEC. 228. **Common-law doctrine relating to notices.**—The common law, in the absence of statutory or other regulations on the subject, would require such notice to be personally given;[1] that it be in writing and signed by the proper officer of the corporation;[2] that it contained the name and place of meeting, unless there be some standing rule or general custom, known to the members, fixing these things;[3] and state the business to be transacted, unless it is a general meeting for the transaction of business, or for a particular object provided for by the articles or by-laws of the corporation.[4]

In the absence of any provision for the length of notice a reasonable time is required, or the usual time, if a custom prevails.[5]

[1] Stevens *v.* Eden Meeting House Soc., 12 Vt. 688; Wiggin *v.* Freewill Baptist Ch., 8 Metc. 301; Stowe *v.* Myse, 7 Conn. 214; Savings Bank *v.* Davis, 8 id. 191; Taylor *v.* Griswold, 2 Green, 222; Rex *v.* Langhorne, 6 N. & M. 203; Stow *v.* Myse, 7 Conn. 219; Bethany *v.* Sperry, 10 id. 200.

[2] The summons must be from one having authority to issue the same. Evans *v.* Osgood, 18 Me. 213; Stevens *v.* Eden Meeting House Soc., 12 Vt. 688; Bethany *v.* Sperry, 10 Conn. 200. See, also, in case of no officer authorized to give notice, Goulding *v.* Clark, 34 N. H. 148; Citizens' Mut. Fire Ins. Co. *v.* Sortwell, 8 Allen, 217; Chamberlaine *v.* Painesville, etc., R. Co., 15 Ohio St. 225.

But it has been held that the notice need not be in writing, and that if the members are fully informed of meetings by parol, it is sufficient. Wilc. on Corp. 46; Rex *v.* Hill, 4 B. & C. 442.

[3] *Re* British Sugar Refining Co., 3 K. & J. 408; 26 L. J. Ch. 369; Graham *v.* Van Diemen's Land Company, 1 H. & N. 541; 26 L. J. Ex. 73; *Re* Irrigation Company of France; Fox Case, L. R., 6 Ch. 176; Jones *v.* Milton & Rush T. Co., 7 Ind. 547; Ang. & Am. on Corp. 496; Warner *v.* Mower, 11 Vt. 385.

[4] Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; Warner *v.* Mower, 11 Vt. 385; Merritt *v.* Farris, 22 Ill. 303; Brice's Ultra Vires, 354, and notes.

[5] Wiggin *v.* Freewill Baptist Soc., 8 Metc. 301; Long Island R. Co., *in rem*, 19 Wend. 37; Ang. & Am. on Corp., § 491; Rex *v.* Hill, 4 B. & C. 442.

In reference to notice, REDFIELD, J., in Warner *v.* Mower, 11 Vt. 385, observed: "It is to be borne in mind, too, that a manifest distinction obtains between general stated meetings of a corporation, and special meetings. I know that stated meetings may nevertheless be special; *i. e.*, limited to particular business. But stated meetings of a corporation are usually general; *i. e.*, for the transaction of all business within the corporate powers. Unless the object of such meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporator would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted at such meeting, unless special notice was given. Where the meeting is stated and general, no notice is required, either of the time or place of holding the meeting, or of the business to be transacted. Ang. & Am. on Corp. 275. Such is the general law of private corporations.

"But as all corporations are entities of the law merely, and exist and act solely in conformity to their charter and by laws, it is obvious that the force and effect of every act of any particular corporation must depend mainly upon the charter and by-laws of that corporation. These are denominated the constitution and laws of the corporation, and, like every other constitution and all other laws, should receive such construction, as to effect the probable intention of the

In reference to this, Mr. Dillon observes: "Due notice of the time and place of a corporate meeting is by the English law essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules which, since they form the basis of much of the statute law in this country upon the subject, and have in the main been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporators are presumed to know of the days appointed by the charter, statute usage, or by-laws, for the transaction of particular business, and hence no notice of such meeting for the transaction of such business is necessary, or for the transactions of mere ordinary affairs of the corporation on such days, yet, if it is intended to proceed to any other act of importance, a notice is necessary the same as at any other time. A notice, when necessary, must, if practicable, be given to every member who has a right to vote; where the act is given to one to be done by a body consisting of a definite class or classes, it must be given by or issued by order of some one who has the authority to convene a corporate meeting. But notice may be altogether dispensed with, or its necessity waived, by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member, or left at his house. If temporarily absent, it may be left with his family, or at his house or last place of abode."[1]

framers. That intention must be judged of, as in other cases, by the words used in reference to the subject-matter and circumstances of each particular corporation.

"The charter of this corporation provides for the first meeting of the corporation specially, and that at that meeting, and at all other meetings legally notified they may make and alter such by-laws as may be thought necessary. There being thus no restriction in the charter in relation to meetings of the corporation or the business to be transacted, that subject will be governed exclusively by the by-laws.

"Those by-laws provide for an annual meeting of the corporation, to be holden at their counting room, on the first Wednesday in April of each year. Thus far the time and place of the meeting is fixed, and there being no restriction in regard to business, any and all business pertaining to the interest and powers of the corporation may be transacted. The annual meeting of all others is the one when, not only usually but always, *all* business is expected to be transacted. And the custom of a country is of great force in the construction of statutes as well as contracts."

[1] 1 Dill. on Mun. Corp., §§ 200, 201. He further states, "The notice must state the time of meeting, and the place if it be not the usual place. It is not necessary to state what business is to be done when the meeting relates only to the ordinary affairs of the corporation; but when it is for the purpose of

What is thus stated relates to municipal corporations, and the notice required to be given to the members of the select or representative body, denominated a council; but it is equally applicable to the select body, in private corporations known as the executive committee or the board of directors.

SEC. 229. **Waiver of notice — presumptions.**—We have already alluded to the fact that the right to notice of a corporate meeting may be waived. If all the members assemble at any meeting and it proceeds to business, this is a waiver of want of notice and the action of the body is not affected thereby.[1] In some cases notice will be presumed in the absence of proof to the contrary. Thus, where it is shown by the records of a meeting of the directors of a corporation that a quorum was present, notice to the others will be presumed.[2] And it has been held that the validity of the acts of directors cannot be collaterally questioned on the ground of the want of requisite notice of the meeting to all the members of the board.[3] The want or irregularity of notice is generally held to be waived, by the presence of all who have a right to attend a meeting.[4]

electing or removing officers, passing ordinances, and the like, the fact should be stated so that the members may know that something more than the usual routine of business will be transacted. Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting, they may, if every one consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice; but the unanimity of consent should plainly appear from their recorded declaration, acts, or conduct. This unanimity is only necessary to enter upon the business; once commenced, the rules which govern the body and its actions apply." 1 Dill. on Mun. Corp., § 202.

The old English doctrine in relation to municipal corporations was, that where corporate acts were to be done not on a charter day, and by a select body, there must be a summons of every member, except such as have absolutely deserted the town. Bac. Abr., tit. E., § 8.

[1] Rex. v. Oxford, Palm. 453; Rex. v. Chetwynd, 7 B. & C. 695; *Re* British Sugar Refining Co., 3 K. & J. 408; 26 L. J. Ch. 369; Samuel v. Holliday, 1 Woolw. (C. C.) 400.

[2] Sargent v. Webster, 13 Metc. 497; Lane v. Brainerd, 30 Conn. 565; Middlesex, etc., v. Davis, 3 Metc. 133. And if the by-laws provide for the place of meetings and the records do not show that the meetings were at a different place, it would be presumed that the meetings were held at the place designated by the by-laws. McDaniels v. Flower Brook Co., 22 Vt. 274.

[3] Chamberlaine v. Painesville, etc., R. Co., 15 Ohio St. 225; Edgarly v. Emerson 3 Frost, 555.

[4] Stebbins v. Merritt, 10 Cush. 27; People v. Peck, 11 Wend. 604; Jones v. Milton T. Co., 7 Md. 547. And in Ohio notice need not be given by those named in the original articles of association, for the purpose of incorporating under a general law. Chamberlain v. Painsville, etc., R. Co., 15 Ohio St. 225.

But if one person is absent who has not received the required notice, or if present refuses his consent to the proceedings, they have been held invalid.[1] But a subsequent recognition by a member, of an agent appointed at a meeting held without giving a proper notice to him, has been held to be a waiver of such notice.[2] And it is well settled that where a board of directors of a corporation, formed for pecuniary profit, orders an act to be done, and the act is subsequently performed, its legality cannot afterward be questioned by any director or stockholder on account of the irregularity of the meeting where he made no objection to the act at the time or afterward when he had an opportunity to do so.[3]

SEC. 230. **Adjourned meetings.**—It is a general rule that corporate meetings may be adjourned, and if a corporate meeting is regularly called any business that might have been lawfully transacted at the original meeting, may also at the adjourned meeting. This is also in accordance with the general rule of parliamentary proceedings.[4]

On this subject Mr. Redfield observes: "It is too well settled to require comment that all corporations whether municipal or private may transact any business at an adjourned meeting which they could have done at the original meeting. It is but a continuation of the same meeting. Whether the meeting is continued without interruption for many days or by adjournment from day to day or from time to time, many days intervening, it is evident it must be considered the same meeting without any loss or accumulation of powers."[5]

In the absence of particular regulations on this subject, the power to adjourn corporate meetings is an incidental common-law right, and adjournments may be made in the usual way to any

[1] People's Ins. Co. v. Westcott, 14 Gray, 440.

[2] Bryand v. Goodman, 5 Pick. 228.

[3] Samuel v. Holliday, Woolw. (C. C.) 400. See, also, Leavitt v. Yates, 4 Edw. 134; Bank of Alabama v. Comegys, 12 Ala. (N. S.) 772; Williams v. Christian Female College, 29 Mo. 250; Port of Lond. Assurance Co. Case, 35 Eng. L. & Eq. 178; Hoyt v. Thompson, 19 N. Y. 207.

[4] 1 Dill. on Mun. Corp., § 226.

[5] Warner v. Mower, 11 Vt. 385. See, also, Smith v. Law, 21 N. Y. 296; People v. Batchelor, 22 id. 128; Farrar v. Perley, 7 Me. 404; Schoff v. Bloomfield, 8 Vt. 472; Field v. Field, 9 Wend. 394; Warner v. Mower, 11 Vt. 395; Hudson Co. v. State, 4 Zabr. 718; Insurance Co. v. Sanders, 36 N. H. 252; Dill. on Mun. Corp., § 223.

future time the same day or any other day, and even to another place than the one where it originally met, if within the territory of its creation.[1]

SEC. 231. **General and special meetings.**—The meetings of corporate bodies may be denominated general and special. The general meetings are usually fixed by the constitution or by-laws of the body, and occur at stated times and places, such as the usual annual or semi-annual meetings for the election of a board of directors and the transaction of other important business. Special meetings are such as are called on particular occasions, and for special purposes. They differ in respect to the notice required. In the former case, if notice is required, it would not be necessary ordinarily to specify the business to be transacted, as members would be required to take notice of it if it was not referred to. But in the latter case, it would be necessary to particularly specify or call attention to the business to be transacted.[2] And it has been held that a notice of a meeting extraordinary in respect to the time of holding it need not specify the business if it is ordinary business.[3]

On the other hand, if the time is that fixed by the laws of the body, but business of an extraordinary character is to be transacted, the notice should contain this special object.[4] And although a member is bound by the action of a majority in relation to matters coming within the scope of the authority of a general meeting, still he is not bound by a notice of a special meeting, given to the attending members of such general meeting; for he would not reasonably expect a notice of that kind to be thus given.

On the subject of general and special meetings, REDFIELD, J., remarks: "It is to be observed that a manifest distinction obtains between general stated meetings of a corporation and special meetings. I know that stated meetings may, nevertheless, be

[1] Chamberlain v. Dover, 13 Me. 466; People v. Martin, 1 Seld. 22; Hubbard v. Winsor, 15 Mich. 146; Kimball v. Marshall, 44 N. H. 466; Goodel v. Baker, 8 Cow. 286.

[2] People v. Batchelor, 22 N. Y. 128; id. 146; Downing v. Ruger, 21 Wend. 178; Burgess v. Pue, 2 Gill. 254; Stow v. Wyse, 7 Conn. 214; Smyth v. Darley 2 H. of L. Cas. 789; Dill. on Mun. Corp., § 224.

[3] Savings Bank v. Davis, 8 Conn. 191.

[4] Zabriskie v. Railroad Co., 23 How. 381; Sampson v. Bowdoinham Steam Mill Corp., 36 Me. 78; People's Ins. Co. v. Westcott, 16 Gray, 440; Atlantic Delaine Co. v. Mason, 5 R. I. 463.

special, *i. e.*, limited to particular business. But stated meetings of a corporation are usually general, *i. e.*, for the transaction of all business within the corporate powers. Unless the object of the meeting is restricted by express provision of the by-laws, it would ordinarily be understood to be general; and so every corporation would be bound to understand it. But if the object of the meeting be limited by the by-laws, it is then a special meeting, and no other business could lawfully be transacted unless special notice was given. Where the meeting is stated and general, no notice is required, either of the time or place of holding the meeting or of the business to be transacted."[1]

SEC. 232. **The majority at a corporate meeting may express the corporate will.** — Where no special provision is made in relation to the matter, a majority of those present may express the corporate will; and the whole body is bound by their acts, whether the number present be a majority of the whole number of members or not.[2] The whole are not only bound by a majority of the members, but by a majority of those present at a lawful meeting. The majority of those who appear, constitute a body capable of transacting business, in the absence of any limitation as to the number who may act. And the will of the majority of the stockholders, who constitute members of the corporation, may adopt by-laws that shall direct and control the directors, who are but the agents of the corporation, appointed by the corporators.

It is a common-law principle that if an act is to be done by an indefinite body, as the whole body of the corporators, it is valid, if directed to be done by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number that may be entitled to be present, unless it is otherwise provided by law.[3] But this is not the doctrine where a definite body, as a board of directors, is authorized to act, which we have already fully considered in treating of directors.[4]

[1] Warner *v.* Mower, 11 Vt. 385. See, also, Redf. on Rail., ch. 4, § 4.

[2] See *post*, ch. 10.

[3] Damon *v.* Granby, 2 Pick. 345; Commonwealth *v.* Ipswich, id. 70; Williams *v.* Lunenburgh, 21 id. 75; Church Case, 5 Rob. 649; First Parish *v.* Stearns, 21 Pick. 148; State *v.* Binder, 38 Mo. 450; St. Mary's Church, 7 S. & R. 517; Presbyterian Cong. *v.* Johns, 27 Miss. 517; Gifford *v.* New Jersey R. Co., 2 Stockt. 171; Sprague *v.* Illinois River R. Co., 19 Ill. 174; East Tenn. R. Co. *v.* Gammon, 5 Sneed, 567; Horton *v.* Baptist Church, 34 Vt. 316.

[4] See *ante*, ch. 6.

the charter or by-laws contain some specific provision upon the subject, and notice to the absent directors will be presumed unless the contrary appears.

"The general rule upon this subject is that the act of a majority of public officers is binding; but that if they be of private appointment, all must act, and in general all must concur, unless there is some provision to accept the decision of a majority. In this respect railway directors certainly come under the former head. The proper distinction upon the subject seems to be, that where the matter is of public concern, and of an executive or ministerial character, the act of a majority of the board will suffice, although the others are not consulted. But where the function is judicial, involving the determination of some definite question, the whole body must be assembled and act together. If the matter is of public concern, the decision of a majority will bind, but in private concerns, as arbitrations, all must concur."[1]

Thus, in England, where a quorum consisted of three directors, and the secretary had affixed the seal of the corporation to a bond after obtaining the written authority of only two of them at a private interview and at another private interview the verbal promise of another to sign the authority, the court held that there should be at least a combined action.[2] And in New Hampshire, it was held that where the by-laws of a private corporation confer upon the directors power to act in behalf of the corporation without special limitation as to the manner, a majority may act within the scope of the authority given the board, and bind the corporation either where there is a consultation of all together and a concurrence of a majority, or where there is a regular meeting at which all might be present and a majority actually meet and act by a majority vote; that the act of a majority does not

[1] 1 Redf. on Rail., ch. 4, § 23; Dispatch Line, etc., v. Bellamy Man. Co., 12 N. H. 205, where a doubt is expressed on this subject. See, also, Edgerly v. Emerson, 3 Fost. 555; Cammeyer v. German Churches, 2 Sandf. Ch. 186; Corn Exchange Bank v. Cumberland Coal Co., 1 Bosw. 436; Dey v. Jersey City, 4 C. E. Green, 412; Schumm v. Seymour, 9 id. 153; Stoystown, etc., T. Co. v. Craver, 45 Pa. St. 386; Ross v. Crockett, 14 La. Ann. 811; Yellow Jacket Mining Co. v. Stevenson, 5 Nev. 224.

[2] D'Arcy v. Tamar, etc., R. Co., L. R., 2 Ex. 158; 36 L. J. Ex. 37; 4 H. & C. 463. But see *Re* Bonellis Tel. Co., Collie's Claim, L. R., 12 Eq. 246, 260. See, also, Glover v. Northwestern R. Co., 5 Ex. 66; 19 L. J. Ex. 172.

All acts of the board should be by resolutions of the board while sitting as such in consultation. Ross v. Crockett, La. Ann. 811.

pointed by the directors, or some person duly authorized for that purpose, and the requisite notice given to each director.

The notice and the mode of serving it, is usually prescribed by the articles, by-laws, or other regulations of the body or the board. And, like meetings of the corporate body, the meetings of the governing body will not be legal, unless the requirement of the law in respect to notice is complied with.[1] And it has been held in England, that if an advertisement is required, as a notice to the members of the board, a circular will not be sufficient.[2]

SEC. 235. **Acts at an irregular meeting may be valid.** — It must not be supposed, however, that all acts and proceedings at an irregular meeting of the board will, under all circumstances, be considered absolutely void. On the contrary, where the interests of third parties are concerned, they have been held valid.

Thus, in a recent case, Mr. Justice MILLER, on this question, expresses himself thus: "The rule is very well settled, and is supported by abundant reasons, that where, at a meeting of the board of directors of a corporation, formed for the purposes of pecuniary profit, an act is ordered to be done without objection, either then or subsequently made to the regularity of the meeting, by any director or stockholder, and the act thus authorized is afterward performed, its legality cannot afterward be questioned in a suit in equity, on the ground of irregularity."[3]

SEC. 236. **Can the directors only act as a board?** — Much controversy exists as to whether the directors may act as directors or agents of the corporation, except as a board, or whether they cannot assent to matters relating to the corporation, separately, and not at a regular meeting, in the capacity of a board.

Mr. Redfield, on this subject, observes: "The decision of a majority of the board of directors is usually regarded as binding upon the company, and the assembling of a majority will be treated as a legal quorum for the transaction of business, unless

[1] Smyth v. Darley, 2 H. of L. 789.

[2] *Re* British Sugar Ref. Co., 3 K. & J. 408; 26 L. J. Ch. 369.

[3] Samuel v. Holladay, 1 Woolw. (C. C.) 400; With. Am. Corp. Cas. 139. See, also, Bank of Alabama v. Comegys, 12 Ala. (N. S.) 772.

SEC. 238. **What constitutes a quorum.**—What number shall constitute a quorum of directors for the transaction of business is frequently if not generally, as we have before observed, fixed by the articles or by-laws of the association. And, where it was provided by the by-laws, that the president and two directors should constitute a quorum, it was held that a majority of the quorum could bind the corporation; and that where at a meeting of the president and two directors, the directors made a sale of lands of the company to the president, it was not invalid for the want of authority.

The supreme court of Iowa, after citing many authorities bearing upon the subject, say: "It follows then, in the light of these authorities, that since the president and two of the directors constituted a quorum, it was competent for two, being a majority of that quorum, to bind the corporation; and if two were able to act, even as against the opposing vote of the other, they could, *a fortiori*, act without his concurrence. Again, the ordinary duties of the president are to preside, determine questions of order, give the casting vote in case of a tie, etc.; and since the vote of the directors was unanimous, there was no occasion or opportunity for the president to cast his vote, even if he had not been disqualified; and the contract of sale was made by just as many directors as were required by the by-laws, or as it was possible to have in the corporation as constituted."[1]

SEC. 239. The general rule is, that if a quorum, which is usually a majority of the whole number of directors, are present, a majority of that quorum may act. But this would perhaps be the rule only when the meeting was a regular one, of which all the members would be required to take notice, or if a special one, where all have been duly notified.

And where the directors consisted of seven persons, and only four of the seven were duly assembled, and the meeting was not a stated one, the court observed: "The meeting in question was not a stated meeting, nor a meeting at which all had been notified

[1] Per COLE, J., in Buell *v.* Buckingham Co., 16 Ia. 284. See, also, Sargent *v.* Webster, 13 Metc. 497; *In re* Insurance Co., 22 Wend. 597; *Ex parte* Wilcox, 7 Cow. 402; Rex *v.* Monday, Cowper, 538; Sawyer *v.* Methodist Episcopal Church, 18 Vt. 405.

to be present. Four only of the seven directors were present, and no others had been notified. The general principles applicable to joint powers are well settled. When individuals or corporations give an authority, jointly, to two or more persons, in order to bind the principal, all must act. But where a number of persons are by law intrusted with a power, not of mere private convenience, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. There are, however, many cases where an authority is granted to a board, or to several persons, or a majority of them, or a certain limited number, either more or less than a majority, who are thereby constituted a quorum. Thus, in the usual form of bank charters, there is a provision, that 'no less than four directors shall constitute a board for the transaction of business,' etc. The effect of this clause we deem the same as a provision, that the directors, or any four of them, shall be competent to transact any business of the bank. Four constitute a quorum, and, when assembled, possess all the powers of the entire board." [1]

SEC. 240. Where three assessors were appointed under an English act for draining, but only two signed the appointment, but the other was present at all their meetings, it was held that the concurrence and signatures of the majority were sufficient.

In this case, Lord TENTERDEN observed: "Perhaps it may not be necessary that all should meet. In this case all three had met. Where it is granted by a charter, that a corporation shall have so many aldermen and so many capital burgesses, and that when one of the latter shall die, depart, or be removed, another shall be elected in his place by the 'mayor and aldermen,' and other capital burgesses then surviving or remaining, or a greater part of them,' the election must be made by a majority of the full numbers of aldermen and of capital burgesses, and a mere minority of members of both bodies who happen to survive is not sufficient." [2]

SEC. 241. **The powers of directors.** — It may, perhaps, be safely affirmed as the settled law, that if the authority of the directors

[1] Per BELL, J., in Edgerly v. Emerson, 3 Fost. 555. See, also, Cram v. Bangor House, 12 Me. 359.

[2] Rex v. May, 4 B. & Ad. 843.

to manage and exercise a general superintendence and control over the affairs of the corporation is conferred by the fundamental law of its constitution, it is an original corporate power conferred on a definite number, and a majority of the whole number assembled at a regular meeting, may act by a majority vote of those present; and that where the by-laws of a private corporation confer upon the directors the power to act for it, without special limitation as to the manner, a majority may act, within the scope of the authority given to them, and bind the corporation, either in case there is a consultation of all together, and a concurrence of a majority, or where there is a regular meeting at which all might be present, and a majority actually meets and acts by a majority.

SEC. 242. **The mode of expressing assent by the directors.** — But where, by the fundamental laws, or the by-laws of a corporation, the directors have power to act for the corporation, without limitation as to the manner, the assent of such directors should, usually at least, be expressed by a vote at a meeting on consultation of such directors, and the corporation be bound only by a majority of such directors thus assembled;[1] and to constitute such meeting a lawful one, it must be one either fixed by law at some definite time and place, or one lawfully called, and of which the directors were notified and a majority assembled; and when the act purports to be the act of the board of directors, it may be presumed to be the act of the majority, until the contrary is shown.[2]

SEC. 243. **Corporate meetings cannot be held outside the state.** — Some controversy has existed in reference to right of the corporators to hold corporate meetings outside the state where the corporation was created. We have already alluded to the fact that a corporation has a legal existence for most purposes, only in the state where constituted; and strictly corporate acts can only be performed in such state, though by the comity of states it may sue and be sued on contracts or for torts in other states; and also, through its agents, make contracts and do other acts within the scope of its powers, like natural persons, in any state.

[1] See *ante*, ch. 6.

[2] Despatch Line, etc., *v.* Bellamy Manuf. Co., 12 N. H. 205.

But a distinction has been drawn in respect to the authority to hold meetings outside the state, between strictly corporate meetings, and meetings of the directors; and this distinction seems to be supported by at least a preponderance of authorities. The question of the right of a corporation to hold strictly corporate meetings outside the state where they are created, was recently presented to the supreme court of Maine. The facts were as follows: A meeting of the corporators was called to organize under its charter in the city of New York, at which meeting the charter was accepted and its officers elected; and the question presented was, whether the acts of the corporators were lawful. The court say: "If the directors of the corporation legally chosen might transact business as such by a vote of the board, at a meeting held in another state, and might authorize persons to execute a conveyance of real estate, yet it would be necessary to show that such persons were legally chosen directors, before any conveyance made by their direction would be considered as legally made. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void. The directors of a corporation are not a corporate body when acting as a board, but a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the corporation exists. Whether the statute provisions of this state and the intention of the legislative power, or the general rule of law respecting corporations be examined, the conclusion must be the same: that this corporation could hold no meeting for the election of its officers, or for the regulation of its affairs without the limits of this state, and all such meetings and proceedings were without right or authority, and wholly void."[1]

The corporation can generally do no acts either within or without the state, except such as are expressly authorized by the organic law of its being, or to be fairly inferred from the powers

[1] Per SHEPLEY, J., in Miller v. Ewer, 27 Me. 517.

See, also, Freeman v. Machias Water Power, etc., Co., 38 Me. 343; Aspinwall v. Ohio, etc., R. Co., 20 Ind. 497; Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623; Merrick v. Brainard, 38 Barb. 574; S. C., 34 N. Y. 208; Smith v. Alvord, 63 Barb. 415; New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer, 648; Stoney v. American Life Ins. Co., 11 Paige, 635; Bard v. Poole, 12 N. Y. 495; Wood Hydraulic, etc., Co. v. King, 45 Ga. 34.

granted, and the acts must be done in the manner and by the officers or agents indicated in such law. And if the organic law does not grant the authority either expressly or by implication, to hold corporate meetings without the limits of the sovereignty creating it, it follows, that they could not thus lawfully meet, and any acts or contracts, attempted to be executed while thus met, would be ultra vires and absolutely void.[1]

Sec. 244. **Directors may hold meetings out of the state.** — In the absence of statutory provisions, or conditions in the organic law of corporations, the almost uniform current of authority is, that the directors of corporations may hold meetings of the board outside the limits of the state where it was constituted.[2]

The directors of a corporation are not the corporation itself, and if they meet without the state of their creation, their proceedings will be valid, for in this respect they are like the agents of a natural person.[3]

[1] Bank of Augusta *v.* Earle, 13 Pet. 587. See, also, Hilles *v.* Parrish, 1 McCarter, 380.

It has been held in New York that the statute, relative to the observance of Sunday, does not apply to the proceedings of business meetings of corporate benevolent societies held on that day; and that such society meetings are not on that account illegal. People *v.* Young Men's, etc., Soc., 65 Barb. 357.

[2] Bank of Augusta *v.* Earle, 13 Pet. 587.

They are generally considered the agents of the corporation. "Natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by them by the laws of the place? The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts through such agents. Yet, as in the case of natural persons, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of the place to exercise there the powers with which it is endowed. Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no vested contract without their sanction, express or implied." Id.

[3] Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13.

Although another state cannot create a corporation in New York, yet, it is no objection to the corporate acts of a foreign corporation, done in New York, that they are authorized by a board of directors held in the latter state, when the acts so done are not repugnant to the laws of the state. Smith *v.* Alvord, 63 Barb. 415.

Thus, where the directors of a corporation, created in Vermont, held a meeting in Massachusetts, and authorized the execution of a mortgage by an agent, and its validity was in question, the supreme court of Vermont said: "The conferring of authority by the directors of a corporation upon an agent to execute a deed is not a corporate act. The directors act in such a case not as a corporation, but as the agents of and in behalf of the corporation. And this authority may be conferred by a vote passed at a meeting of the directors without the state where the corporation was created and exists. * * * We have no occasion now to discuss or decide whether a corporation created in one state can legally hold a corporate meeting and pass corporate votes in another. There certainly seems to be strong reasons for holding that they cannot act in a strictly corporate capacity where they have no legal existence. But we do not regard this conferring authority by the directors upon an agent, to execute a deed, as being a corporate act, any more than any and every other act or contract they do or make on behalf of the corporation. It is a mere question of authority in the directors, and not one of corporate power; and when it is established that the power is vested in the directors, it cannot, with any more propriety, be said that they are performing a corporate act in conferring it, than in every other matter where they bind the company by their official agency as directors. They act, in neither case, as the corporation, but as the agents of and in behalf of the corporation."[1]

A contract with a corporation cannot be void because executed out of the state of its creation, for, although it seems well settled that a corporation cannot as such and in its corporate capacity hold meetings or transact business out of the sovereignty of its creation, or migrate to another sovereignty, and retain its legal existence as such, this does not prevent its directors or other agents from doing business within another sovereignty, for by the comity between states and nations they may sue and be sued, and may contract and be contracted with, through their agents, the same as natual persons.

"The mere place," observes the supreme court of Indiana,

[1] Arms v. Conant, 36 Vt. 744. See, also, Galveston R. Co. v. Cowdrey, 11 Wall. 476.

"where the active agents of a corporation enter into a contract, must in general be immaterial. The important question arising must be one of power, not of place. The exercise of power has relation to the place of their legal establishment, where the contract may be subsequently acted under. The meetings of directors of a business corporation are not analogous to the sessions of a judicial tribunal. The corporation is organized by the election of directors, but the mere organization of directors into a formal meeting for business afterward is quite a different thing. States cannot migrate, but by their agents they are daily making contracts without their territorial boundaries." [1]

SEC. 245. **Jurisdiction in equity to restrain by injunction.**—It is now a generally received doctrine that courts of equity have jurisdiction to enjoin corporate elections. The exercise of this power and the law upon this subject is, however, of modern origin. But, as we have already observed, the law relating to private corporations has been the growth largely of the present century, and due mainly to the rapid increase and vast importance of the various enterprises which have called them into existence. Courts of equity, in the exercise of their legitimate functions, have adapted their remedies to meet the requirements occasioned by the growth of various business interests and the complications of modern enterprises; and in modern times, in the exercise of its powers, it has assumed to control the elections of private corporations where the principles of equity seemed to require it. This power of the courts of equity jurisdiction has been recognized in this country,[2] and a succession of decisions have firmly established this jurisdiction of the courts.[3]

[1] Wright *v.* Bunday, 11 Ind. 404.

[2] Haight *v.* Day, 1 Johns. Ch. 18 (1814).

[3] Walker *v.* Devereaux, 4 Paige, 229 (1833); Campbell *v.* Poultney, 6 G. & J. 94 (1834); Hilles *v.* Parish, 1 McCart. 380 (1862); Webb *v.* Ridgely, 38 Md. 364 (1872); Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. (C. C.) 525 (1867).

In the case of Walker *v.* Devereaux, above cited, Chancellor WALWORTH observes: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election. And in a case of imperious necessity, where the complainant did not know and could not ascertain the names of the other stockholders, I might consider it my duty to prevent a great and irreparable injury to him, although the effect of that interference might be to destroy the charter of the corporation. But in the exercise of such a power the court should require ample security from the complainant to pay

Although the right to restrain the holding of corporate meetings seems to be fully recognized in the cases cited in the notes, the exercise of this restraining power has been usually exercised to restrain parties from casting illegal votes at such elections.

But, in Wisconsin, in a case where a complaint was filed by a minority of the directors of a railroad company against the majority and one Jones, a stockholder, charging the directors with having fraudulently conspired to obtain absolute control of the affairs of the company; with having fraudulently caused capital stock to be issued to a large amount, for the purpose of using the vote upon such stock for furthering their fraudulent purposes at the election; with having caused, by resolution, the subscription book of the company to be closed until after the election, in order to prevent *bona fide* subscriptions to the stock, which might change the result of the election; that such stockholder, Jones, intended to vote on stock which he had fraudulently received from the company, under an ageement with it to convey to it certain lands, to a portion of which he was unable to give a good title; and that the corporation was entitled to a return of such shares, in proportion as such defendant failed to furnish the title to such lands. A preliminary injunction which was granted was dissolved by the court below, and an appeal was taken to the supreme court of that state, where the jurisdiction of the court in the matter was not questioned, but the judgment of the court below was sustained on other grounds. The opinion of the court was delivered by Mr. Justice COLE, who observes: "Now, upon general principles, it would seem improper and most mischievous to grant an injunction upon the complaint of a minority of the board of directors to restrain a stockholder from voting upon an alleged excess of stock held by him, before the company had taken any steps to cancel the stock or declare it void. We have

all damages other persons might sustain by the granting of the injunction, if it should be subsequently ascertained that it was not warranted by the real facts of the case. The oath of the complainant that he is informed and believes the existence of a fact, may be sufficient ground to authorize the issuing of an injunction against a defendant who has had an opportunity to deny the allegation if it is unfounded, but it is not sufficient to justify the court in destroying or injuring the rights of others who have not had an opportunity of being heard by themselves, or by those who are under a legal obligation to protect their rights."

not been referred to any case where an interposition of the court by injunction has been exercised for such purpose, and after some research we have been able to find none. But from the allegations of this complaint, it is not easy to perceive how it would produce irreparable and permanent injury to the company, as plaintiffs, even if Jones should vote upon this alleged excess of stock. The complaint fails to show that imminent danger to the property of the plaintiffs is threatened by the contemplated acts, nor does it present any other sufficient ground or reason for arresting or restraining him from voting upon this stock."[1]

[1] Reed *v.* Jones, 6 Wis. 680 (1857). See, also, *post*, as to injunction, § 408.

CHAPTER IX.

CORPORATE CONTRACTS.

SEC. 246. **The power to contract, a corporate incident; construction of the power.** — We have noticed that it was one of the incidental powers of a corporation at common law to make contracts the same as natural persons, being limited in this respect only by the general laws, or its fundamental laws, or the provisions of the constating instruments.[1] This right embraces also all matters that

[1] Barry *v.* Merchants' Exch. Co., 1 Sandf. Ch. 280; Brady *v.* Mayor, etc., 1 Barb. 584. In Barry *v.* Merchants' Exch. Co., *supra*, SANFORD, V. C., observes: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations the same as an individual. * * * And every such corporation has power to make all contracts which are necessary and usual, in the course of the business it transacts, as a means to enable it to effect such object, unless expressly prohibited by law."

are not only within the express provisions of these laws and instruments, but also the right to contract, in reference to all matters and to any extent that comes within the scope of the authority, as conferred by such laws and instruments, on a fair construction of the same, they being interpreted in view of the objects and purposes of its creation.

"The power to make contracts," observes Mr. Dillon, "and to sue and be sued thereon, is usually conferred in general terms in the incorporating act. But where the power is conferred in this manner it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, and fit and proper to enable the corporation to secure or carry into effect the purposes for which it was created, and the extent of the power will depend upon the other provisions of the charter defining matters in respect to which the corporation is authorized to act. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is indeed an implied incidental authority to contract obligations and sue and be sued in the corporate name."[1]

SEC. 247. **Mode of exercising the power.**—The will or assent of the corporation can be expressed only by the voice of the majority, or in case of joint-stock corporations, by the will of those holding a majority of the shares of the capital stock. We have also noticed, that the power of the corporate body in this respect, and generally, for the control and management of the corporate business, is vested in a board of directors, and that where such is the case, the majority, or a quorum of them, may express the corporate will or assent in the same manner as where the authority rests with the body of the corporators. In this way contracts on the part of the corporation may be either directly assented to, or authority expressly conferred upon agents for this purpose. And this authority thus conferred may be evidenced by an instrument

[1] Dill. on Mun. Corp., § 371. See, also, 1 Kyd on Corp. 69; 2 Kent's Com. 224; Ang. & Ames on Corp., §§ 110, 271; Chaffee *v.* Granger, 6 Mich. 51; Douglas *v.* Virginia City, 5 Nev. 147; Goodrich *v.* Detroit, 12 Mich. 279; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Seibrecht *v.* New Orleans, 12 La. Ann. 496; Galena *v.* Commonwealth, 48 Ill. 423; Straus *v.* Ins. Co., 5 Ohio St. 59: Bateman *v.* Mayor, etc., 3 H. & N. 322; Rome *v.* Cabot, 28 Ga. 50; Hale *v.* Houghton, 8 Mich. 458; Miller *v.* Milwaukee, 14 Wis. 642.

in writing signed by the president and secretary and authenticated with the common seal annexed or stamped upon the instrument.

But this is not usually essential. It is sufficient in order to bind the corporation to show that the corporate assent is given, and this may be given as above stated. The formal execution of an instrument by the president and secretary as such officers on behalf of the corporation and authenticated by the common seal, may be convenient and desirable as evidence, but it is not usually essential.[1]

Contracts are executed for the corporation by some authorized agent. The requirements of the law to constitute a valid contract in respect to the form and mode of its execution, applicable in case natural persons are the contracting parties, are usually equally applicable to corporations. If a verbal contract, relating to the same subject, would be good between private persons, it would be good between corporations, or between them and private persons or copartnerships. If, under the same circumstances, the contract should be in writing, it would be necessary in case a corporation was a party. If it should be under seal, if natural persons only were parties to it, under like circumstances it should be under seal where a corporation is a party. But if the mode of the execution of contracts is prescribed by the statute or the fundamental law of the institution, that mode should be followed.

On this subject, MARSHALL, C. J., observes: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or

[1] See *ante*, § 226; *post*, ch. 10; Dill. on Mun. Corp., § 374; Fanning *v.* Gregoire, 16 How. 524; Abby *v.* Billups, 35 Miss. 618; Alton *v.* Mulledy, 21 Ill. 76; Western, etc., Society *v.* Philadelphia, 31 Pa. St. 175; Clark *v.* Washington, 12 Wheat. 40; Hamilton *v.* Railroad Co., 9 Ind. 359; Ross *v.* Madison, 1 id. 281; Story on Agency, § 52.

"In our own country where private corporations for literary, religious and commercial purposes have been multiplied beyond any former example, their facility in acting and contracting is involved with public prosperity itself; and after mature consideration, the old technical rule has been condemned as impolitic and essentially discarded. Indeed it seems to result from the very structure of these artificial beings that inasmuch as there are two general modes in which they may express their assent, there are two general modes in which they expressly contract, first by vote and secondly by their duly authorized agents." Ang. & Am. on Corp., § 228. And this was the doctrine of the civil law. Ayliffe's Civ. L. Sup. 12, 1, 22. See, also, Fleckner *v.* U. S. Bank, 8 Wheat. 357; Union Springs Co. *v.* Jenkins, 1 Caines, 381.

the instrument no more creates a contract than if the body had never been incorporated." [1]

Where the acts incorporating an insurance company provided that all policies and other instruments to bind the company must be signed by the president or some other officer, it was held that a contract to cancel a policy should be signed by the president or other of its officers. [2] But where the charter of a bank provided that all contracts on behalf of the bank should be signed by the president and countersigned by the cashier, and that the funds of the bank should not be liable on any contract or engagement, unless so signed, it was held that the provision did not cover contracts implied in law; and that a recovery might be had against the bank, for money advanced upon a check, signed by the cashier, only, but made in the usual course of its business. [3] So, it has been held, that a bank, authorized by its charter to contract in a particular way, may nevertheless be liable on instruments executed in a different mode, where such a course has been commonly pursued by the bank, such provisions being considered merely directory. [4]

We shall hereafter consider the liability of corporations in cases of contracts ultra vires, where they have been executed, and they have received the consideration or the fruits of such a contract. [5]

SEC 248. **Incidental powers of a corporation.** — It is a familiar doctrine that corporations possess not only such powers as may be expressly conferred, but also such as are to be reasonably inferred from those expressly granted, and necessarily required in the prosecution of the objects and purposes of the corporation. [6] These incidental powers are such as are necessary for the purpose of car-

[1] Head *v.* Insurance Company, 2 Cranch, 127; Fanning *v.* Gregoire, 16 How. 524; White *v.* New Orleans, 15 La. Ann. 667; Dey *v.* Jersey City, 19 N. J. Eq. 412; Baltimore *v.* Reynolds, 20 Md. 1; Matthews *v.* Skinker, 62 Mo. 329.

[2] Id. See, also, Davis *v.* North River Ins. Co., 1 Cow. 462; Hill *v.* Manchester Water Works Co., 2 Hen. & M. 573; 5 B. & Ad. 866; Safford *v.* Wycokoff, 4 Hill. 446.

[3] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326.

[4] Bulkley *v.* Derby Fishing Company, 2 Conn. 254.

See further as to matters in charters, which are treated as merely directory, Mott *v.* U. S. Trust Company, 19 Barb. 568; Union Ins. Co. *v.* Keyser, 32 N. H. 313.

[5] See *post*, §§ 257, 263.

[6] Morris R. Co. *v.* Newark, 2 Stockt. Ch. 352; Dartmouth College *v.* Woodward, 4 Wheat. 636; Beach *v.* The Fulton Bank, 3 Wend. 583; Green's Brice's Ultra Vires, 28 *et seq.*

rying into effect the powers expressly granted.[1] But the powers claimed as incidental must be such as are directly and immediately appropriate to the execution of the specific power granted, and not merely such as have slight or remote relation to it.[2] Nor is the power or grant to be construed to carry as incident any authority to agents, not possessed by the principal, nor usually appurtenant to the business, or of a similar character.[3]

It is also a rule of construction of corporate statutes and constating instruments, that they must be construed strictly, and most strongly against the grantee and in favor of the public. And this will be determined from the language of such statutes and instruments, "and not from some possible intentions of their framers."[4] But the language must be reasonably construed to carry out the general purposes of the legislature, and of the framers of the instruments.[5]

[1] Bank of Augusta *v.* Earle, 13 Pet. 519; Dartmouth College *v.* Woodward, 4 Wheat. 636; Trustees *v.* Peaslee, 15 N. H. 330; Downing *v.* Mt. Washington R. Co., 40 id. 231; People *v.* Utica Ins. Co., 15 Johns. 357; Le Couteulx *v.* City of Buffalo, 33 N. Y. 333; Railroad *v.* Seeley, 45 Mo. 220; Vandall *v.* S. S. F., etc., Co., 40 Cal. 83; Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491; Mobile, etc., R. Co. *v.* Franks, 41 Miss. 494.

[2] Hood *v.* New York etc., R. Co., 22 Conn. 1; Curtis *v.* Leavitt, 15 N. Y. 157; Buffett *v.* Troy, etc., R. Co., 40 N. Y. 176.

[3] Beaty *v.* Knowler, 4 Pet. 152. See, also, Colman *v.* Eastern, etc., R. Co., 10 Beav. 1; Salomons *v.* Laing, 12 id. 339; Eastern, etc., R. Co. *v.* Eastern, 11 C. B. 775; Shrewsbury, etc., R. Co. *v.* London, etc., R. Co., 22 L. J. Ch. 682; Green's Brice's Ultra Vires, 66 *et seq.* and notes.

[4] Green's Brice's Ultra Vires, 63, and note; Cooley's Const. Lim. 394.

[5] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Providence Bank *v.* Billings, 4 id. 514; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. 172; Richmond R. Co. *v.* Louisa R. Co., 13 id. 71; Pennock *v.* Coe, 23 id. 117; Rice *v.* Railroad Co., 1 Black, 358; Delaware Tax Cases, 18 Wall. 206; Auburn Plank-road Co. *v.* Douglass, 9 N. Y. 444; Rensselaer, etc., R. Co. *v.* Davis, 43 id. 137; *In re* New York, etc., R. Co. *v.* Kip, 46 id. 546; Black *v.* United Cos., 7 C. E. Green, 130; S. C., 9 id. 455; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige, 554; C. & A. R. Co. *v.* Briggs, 2 Zabr. 623; Townsend *v.* Bown, 4 id. 80; Wright *v.* Carter, 3 Dutch. 76; Bridge Prop. *v.* Hoboken, etc., Co., 2 Beas. 81; S. C., 1 Wall. 116; Bardstown, etc, R. *v.* Metcalfe, 4 Metc. (Ky.) 199; Bank *v.* Commonwealth, 19 Pa. St. 144; Penn., etc., R. Co. *v.* Canal Coms., 21 id. 9; Commissioners *v.* Erie, etc., R. Co., 27 id. 339.

A banking institution, created in one state, may through its agents deal in exchange in another, provided there is nothing in the charter to restrict such action within the state where created. This right is among its incidental powers. In Bank of Augusta *v.* Earle, *supra*, Chief Justice TANEY, observed:

"It may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner, as the charter authorizes. And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right

SEC. 249. **Cases illustrating the subject.** — It has been held that corporations for railroad purposes have implied authority to erect

to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.

"The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution. And also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

"But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extra territorial operation; and that as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

"It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of The United States *v.* Amedy, 11 Wheat. 412, and in Beaston *v.* The Farmers' Bank of Delaware, 12 Peters, 135. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

The corporation must no doubt show that the law of its creation gave it authority to make such contracts, through such agency. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place: and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

"Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied.

refreshment rooms;[1] that a corporation authorized to erect a market can purchase land on which to erect the same; and an authority granted to borrow money, upon such terms as may be

And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the right of individuals is concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, 37, that 'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.'

"Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts; since the case of Henriquez *v.* The Dutch West India Company, decided in 1729, 2 Ld. Raym. 1532. And it is a matter of history, which this court are bound to notice, that corporations, created in this country, have been in the open practice, for many years past, of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts, by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations, made out of the state by which they were created, are void, even contracts of that description could not be enforced.

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations toward the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution

[1] Flanagan *v.* Great Western R. Co., L. R., 7 Eq. 116. See, also, Clark *v.* Cuckfield Union, 21 L. J. Q. B. 349.

agreed upon between the parties, is an authority to pay interest thereon, even beyond the sum authorized by law.[1]

So, a banking corporation would, in the absence of limitations, have power to perform the ordinary business of banking, and, of course, to take negotiable paper.[2] And it would appear to be a

of the United States. The court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness toward one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted toward each other the laws of comity in their fullest extent. Money is frequently borrowed in one state by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the states, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the state courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty — where the last-mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied."

[1] Dill. on Mun. Corp., § 372; Morrison v. Eaton, etc., R. Co., 14 Ind. 110.

[2] Dill. on Mun. Corp., § 407, citing McCollough v. Moss, 5 Denio, 567; Straus v. Eagle Ins. Co., 5 Ohio St. 59; Mott v. Hicks, 1 Cow. 513; Attorney-General v. Insurance Co., 9 Paige, 470; 2 Kent's Com. 299; 1 Pars. on N. & B. 165;

generally recognized doctrine that private corporations for pecuniary gain have incidental authority to borrow money for the legitimate purposes of their business, unless restricted from so doing by the organic laws of their creation; and that they may give the usual obligations therefor.[1]

In determining the question of corporate powers in relation to the execution of a contract, it is proper to consider, first, whether there is any thing in the charter or statutes under which it is constituted which forbids or permits it to make such a contract; and if these are silent on the subject; second, whether the power to make such a contract may not be implied as directly or incidentally necessary to enable it to fulfill the purposes of its existence, or whether the contract is entirely foreign to that purpose.[2]

SEC. 250. **Contracts relating to bailments.**—The general principles and doctrines of the law of bailments, where individuals only are

Clark v. Des Moines, 19 Ia. 213; Barry v. Merchants' Express Co., 1 Sandf. Ch. 280; Curtis v. Leavitt, 15 N. Y. 9; Smith v. Law, 21 id. 296; Bank, etc., v. Chillicothe, 7 Ohio, part II, 31; Ketchum v. Buffalo, 14 N. Y. 356; Douglas v. Virginia City, 5 Nev. 147; Came v. Brigham, 39 Me. 39; Goodnow v. Commissioners, 11 Minnesota, 31.

[1] Stratton v. Allen, 16 N. J. Eq. 229; Dill. on Mun. Corp., § 81; Union Mining Co. v. Rocky Mountain Nat. Bank, 2 Col. T. 248.

[2] Weckler v. First National Bank, 42 Md. 581.

On the subject of the construction of statutes of incorporation the supreme court of Pennsylvania observe: "When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. * * * In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation." Pennsylvania R. Co. v. Canal Coms., 21 Pa. St. 22.

And on the same subject the supreme court of Connecticut say: "The rules of construction which apply to general legislation in regard to those subjects in which the public at large are interested are essentially different from those which apply to private grants to individuals of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted; the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the state or sovereign power, and is exercised solely for the general good of the community; in the other, it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled." Bradley v. New York, etc., R. Co., 21 Conn. 306.

parties to the contract, are equally applicable where a corporation is the bailee.[1]

A full consideration of the liability of corporations in such cases would not be consistent with the limits of this treatise. Most of the important questions on this subject, affecting corporations, relate to railroad corporations, which are the subject of special treatises.[2] But in relation to the duties and liabilities in general of bailees, there are also special treatises which may be consulted.[3] The liability in such cases would, of course, depend upon the nature and character of the bailment.

It may, however, be proper to refer to some of the more common cases of liability, for the acts of agents of a corporation in cases of bailment. In respect to the liability of the principal in such cases, it may be affirmed, as a general rule, that he is liable in all cases where the business is transacted by an agent, if such agent acts in the matter, within the scope of the authority conferred upon him; and the practice or custom of the agent, to act in a particular business for the corporation, and with the knowledge and approbation of the principal, would furnish evidence in that respect, of his authority to act, generally, in a similar matter.

SEC. 251. **What would and would not be within the scope of an agent's authority in case of bailments.** — An illustration of what is within the scope of the authority of an agent may be found in the business of banking. If a party deposits with a bank and receives from the cashier or other proper agent or officer a certificate of his deposit, he should, in the usual course of business, receive a credit for such deposit, and if such moneys should afterward be fraudulently or feloniously appropriated or taken by such officer or agent, or other persons, the bank would be liable for the deposit, as it would be within the scope of the authority of such officer or agent to receive and credit the same; but, if such person should, by a personal and private arrangement with such cashier or other officer or agent, make a special deposit

[1] Foster v. Essex Bank, 17 Mass. 496; Ang. & Am. on Corp. 246.

[2] See Redfield on Railways; Honey's Am. R. Cas.; Pierce on Railways; Lacy's Dig. R. Cas.

[3] See Story on Bailments; Edwards on Bailments; Redfield on Bailments.

of money with him, from which the bank could receive no benefit, this would not be within the usual scope of his authority; and if such agent should fraudulently or feloniously abstract such special deposit from the vaults of the bank, without the gross negligence of the bank, it would not be liable therefor.

In a case of this character the supreme court of Massachusetts say: "The bank was no more liable for this act of his (the cashier), than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank."[1] But in this case the agent did not act for the bank, nor bind the bank by any valid contract in reference to the deposit. The officer, however, would be personally liable for the conversion. And the bank would also be liable for the conversion if the act was authorized. But we shall hereafter consider the subject of torts and the liability of corporations for the torts of its agents.[2]

The general principles of the law of agency are applicable to corporations; as, for instance, where a note or other negotiable instrument is left with a bank for collection. It would be the duty of the bank to use due care and diligence in procuring a demand to be made of parties liable thereon, and giving notice to the indorsers, and for this purpose to secure the services of a notary. And a failure so to do would render the bank liable for any damages caused by such failure.[3]

SEC. 252. **Place of contracting by the corporation.** — We have heretofore stated that the corporate body, as an incorporeal and ideal person, can have a legal existence, only, within the state creating it.[4] For the purpose of determining questions relating to the jurisdiction of courts it is also treated only as a citizen of the sovereignty by whose authority it exists;[5] and acts of the cor-

[1] Foster *v.* Essex Bank, 17 Mass. 479. See, also, Manhattan Co. *v.* Lydig, 4 Johns. 377; Union Bank *v.* Knapp, 3 Pick. 96; Fulton Bank *v.* New York Canal Co., 4 Paige, 127.

[2] See *post*, ch. 12.

[3] Agricultural Bank *v.* Commercial Bank, 7 S. & M. 592; Frazier *v.* N. O. Gas, etc., Co., 2 Rob. (La.) 294; Bank of Owego *v.* Babcock, 5 Hill, 152; Warren Bank *v.* Suffolk Bank, 10 Cush. 582; Citizens' Bank *v.* Howell, 8 Md. 530.

[4] See *ante*, § 25. See, also, Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 497; Freeman *v.* Machias Water Power Co., 38 Me. 345.

[5] See *post*, ch. 13.

porate body, as such, can only be performed within the limits of such sovereignty.[1]

But it is also the generally received doctrine of the courts, that such corporations may, by their agents, execute contracts without the limits of the territory of its creation; the only controversy growing out of the proposition relates to the question whether the party acting is an agent, or whether such party does not stand for or represent practically the corporate body. This question arrises where the duly constituted directors of a corporation undertake to act without the limits of such territory.

SEC. 253. On this subject it is observed by TANEY, C. J., as follows: "It may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents and in such a manner as the charter authorizes. And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void. * * * Natural persons, through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place? The corporation must no doubt show, that the law of its creation gave it authority to make such contracts through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place, and that it is permitted by the laws of the place to exercise these, the powers with which it is

[1] See *ante*, § 243.

endowed. Every power, however, of the description of which we are speaking, which the corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question, * * * whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another. * * * We can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. It is nothing more than the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state." [1]

SEC. 254. **Place of contracting by directors.** — The question has been presented whether the directors, with the usual powers and authority of such officers and representatives of the corporate person, are such agents of the corporation, as will enable them to hold meetings, appoint agents, and make contracts acting as a board for the corporation, outside the jurisdiction of the sovereignty under which the corporation was instituted.

This question was presented to the supreme court of the United States in a recent case, where the directors of a railroad corporation, organized in Texas, met in the city of New York, and there authorized the execution of the mortgages on which suit was brought; and one defense was a want of authority of the directors to execute or authorize their execution in New York. The court say: "It is next objected that the mortgages were not properly executed, because the meetings of the directors, by which the mortgages were authorized to be executed, were held in the city of New York. It is not denied that the mortgages were executed in good faith under the corporate seal, and signed by the president and countersigned by the treasurer of the company, and duly recorded in the proper offices of registry in the state of Texas. No doubt it can be true, in many cases, that the extra territorial acts of directors would be held void, as where a set of directors

[1] Bank of Augusta v. Earle, 13 Pet. 587.

of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory and may sue and be sued therein." [1]

So in Vermont it has been held that the conferring of authority by the directors of a corporation, upon an agent to execute a deed, was not a corporate act; that the directors in such cases do not act as the corporation but as its agents, and that this authority may be conferred by such directors, at a meeting held without the state of the legal existence of the corporation; that though the corporation as such cannot hold corporate meetings or pass corporate acts in another state, still, if the directors have authority to act, they do not act as the corporation but as its agents, and may execute such authority outside the state where the corporation exists.[2]

The general doctrine applicable to such cases is that the directors are agents, and not the corporation, and according to the general rule they may meet anywhere, and that their proceedings at such meetings in the absence of fraud will be as binding upon the corporation as though held in the state where it was organized.[3] But where the acts or constating instruments prohibit such a meeting of the directors, this is conclusive, and no authority would exist in such board to contract or authorize a contract to be made binding upon the corporation, outside the limits of the sovereignty of its legal existence.[4]

SEC. 255. **Corporate bills and notes — negotiable quality of corporate bonds.** — It is not unusual for the corporate seal to be annexed to

[1] Galveston R. Co. v. Cowdrey, 11 Wall. 476.

[2] Arms v. Conant, 36 Vt. 745. See, also, Miller v. Ewer, 27 Me. 517; McCall v. Byram Man. Co., 6 Conn. 428.

[3] Ohio, etc., R. Co. v. McPherson, 35 Mo. 13; Wright v. Bundy, 11 Ind. 398.

[4] Ormsby v. Vermont, etc., Co., 56 N. Y. 623; Hilles v. Parrish, 1 McCarter, 380. See, also, Merrick v. Brainard, 38 Barb. 574; S. C., 34 N. Y. 208; Smith v. Alvord, 63 Barb. 415; New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer, 648; Bond v. Poole, 13 N. Y. 495; Wood v. Hydraulic, etc., Co. v. King, 45 Ga. 34.

negotiable instruments of a corporation, such as notes and bills.

The general doctrine in England and in this country is that such seal does not affect the negotiable qualities of such instruments.[1] In fact it has been held in this country that municipal bonds, as well as the bonds of private corporations, issued and intended to be passed from one to another by delivery merely, have the properties of negotiable paper, though under seal, and even although they may not be made payable to bearer or order, but are transferred by indorsement in the usual way of negotiable instruments.

On this question the supreme court of the United States, through Mr. Justice GRIER, has said: "This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by the courts as a part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade judgment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recogni-

[1] See Aggs *v.* Nicholson, 1 H. & N. 165; 25 L. J. Eq. 248; Bateman *v.* Mid-Wales, R. Co., L. R., 1 C. P. 499; Green's Brice's Ultra Vires, 163; New Zealand Caulking Co. *v.* Blakely Ordinance Co., L. R., 3 Ch. 154; *In re* Agra and Masterman Bank, *ex parte* Asiatic Banking Corp., L. R., 2 Ch. 391; Myers *v.* York, etc., R. Co., 43 Me. 232.

tion, not only in this court, but of nearly every state in the union, is well known and admitted."[1]

In the case of bank bills and notes and promissory notes made payable to bearer, or if not so payable, still if by a blank or other indorsement by the payee it is made so payable, the holder is usually treated as the owner. By analogy the rule in such cases has been applied to the ordinary bonds of corporations, and they are regarded by the almost uniform decisions of our courts as possessed of the qualities of negotiable instruments.[2] This doctrine has been aided not only by the tendencies of judicial opinions, but sometimes by positive legislative enactments.[3]

[1] Mercer Co. v. Hacket, 1 Wall. 95. See, also, Gelpcke v. City of Dubuque, id. 175 ; Murray v. Lardner, 2 id. 110; Thompson v. Lee Co., 3 id. 327 ; Aurora City v. West, 7 id. 82 ; City v. Lamson, 9 id. 481; Smith v. Sac Co., 11 id. 150; Pendleton Co. v. Brittan, 15 id. 566; Kenicott v. Supervisors, 16 id. 452; St. Joseph v. Rogers, 16 id. 644; Nugent v. Supervisors, 19 id. 241; Clark v. Iowa City, 20 id. 583; White v. Vernon, etc., R. Co., 21 How. 575.

[2] Durant v. Iowa Co., 1 Woolw. 69; Miller v. Rutland, etc., R. Co., 40 Vt. 399; Chapin v. Vermont, etc., R. Co., 8 Gray, 577; Haven v. Grand Junction R. Co., 109 Mass. 88; National Exchange Bank v. H. P., etc. R. Co., 8 R. I. 375; Society, etc., v. City of New London, 29 Conn. 174; State of Ill. v. Delafield, 8 Paige, 527; S. C., 2 Hill, 159; Bank of Rome v. Village of Rome, 19 N. Y. 20; Brainerd v. New York, etc., R. Co., 25 id. 496; S. C., 10 Bosw. 332; Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co., 41 Barb. 9; Blake v. Livingston Co., 61 id. 149; Morris Canal Co. v. Lewis, 1 Beas. 323; Winfield v. City of Hudson, 4 Dutch. 255; De Voss v. Richmond, 18 Gratt. 338; Barrett v. Schuyler Co., 44 Mo. 197; Smith v. Clark Co., 54 id. 58; Porter v. McCollum, 15 Ga. 528; Craig v. City of Vicksburg, 31 Miss. 217; Maddox v. Graham, 2 Metc. (Ky.) 56; New Albany P. R. Co. v. Smith, 23 Ind. 353; Johnson v. County, 24 Ill. 92; Clapp v. County of Cedar, 5 Iowa, 15; Clark v. City of Janesville, 10 Wis. 136; Langston v. South Carolina, etc., R. Co., 2 S. C. 248. See, also, opinion of Mr. Justice DILLON upon the legality of municipal railway aid bonds, 1 Dill. (C. C.) 555.

[3] An interesting statement and history of the law relating to corporate bonds may be found in the opinion of the court of apeals in New Jersey in the case of the Morris Canal & Banking Co. v. Fisher, 1 Stockt. 667. The court say: "That under ordinary circumstances the property of bank notes and of bills and promissory notes payable on their face, or by a blank indorsement to a bearer, follows the possession, has long been settled. By analogy to this class of cases the exigencies of business have from time to time introduced other securities into the same category. The court of king's bench seems to have hesitated to recognize India bonds as belonging to it. Glyn v. Baker, 13 East, 509. But parliament immediately interfered, and declared them negotiable instruments. Exchequer bills were so regarded in Wookey v. Pole, 4 B. & Ald. 1.

"In the case of Gorgier v. Mieville, 3 B. & C. 45, bonds of the king of Prussia, which were shown to be ordinarily passed from hand to hand by delivery and so designed, were held to be like money bills, so as to give a *bona fide* possessor the legal title.

"And in the case of Long v. Smith, 7 Bing. 284, the same principle was applied to the case of instruments issued by the government of Naples, although in that case they were held not to be negotiable, because it was found that they did not usually circulate without a certificate, which did not accompany them.

"The manner in which these bonds are engraved with coupons, making the interest payable half yearly to the bearer of them, and all the evidence

SEC. 256. **Coupons; their incidents and qualities.**—It is usual to have attached to corporation bonds, and executed in the same manner as the bonds, coupons, or certificates of the amount of interest to become periodically due on such bonds and a promise to pay the same, and specifying the time and place of payment. These are designed to be cut off and presented for payment when due.

Interesting and important questions relating to the character and qualities of such instruments have been presented to the courts. May they be dissevered from the bonds, and transferred like negotiable instruments? Do they in turn draw interest, if not paid when due? Are they to be considered as secured by the mortgage or other security given to secure the bond from which they have been detached? When are they barred by the statute of limitations? Do they lose their validity, if the bonds are paid or canceled before maturity of the coupons?

These and other questions relating to coupons have been determined and settled by the courts.

Thus, it has been held that coupons may be detached from the bonds, and that thus detached they possess the same commercial and negotiable qualities as the bonds themselves;[1] that after they

before us, conspire to show that the company which issued them and which now disputes the title of the holder, on the ground that they put them into the hands of the seller for a special purpose, which did not authorize him to dispose of them as he did, really intended them to circulate as they do.

"This design is indeed quite as apparent as if it was engraved on their face in express words. The objection now made, that the legal character of the instrument is such as to frustrate this design, certainly comes with a bad grace from the party which put them in circulation. Even as between third parties we suppose the common usage to transfer them by delivery without inquiry as to the title of the transferor would justify us in holding these securities to differ from common obligations, in being so far negotiable that the *bona fide* possessor shall be held to have a good title. But the case is still stronger against the party which made and issued them, with full knowledge of the prevailing usage, and with manifest design that they should be so circulated. To permit such parties to dispute this result of the usage would be to permit them to take advantage of their own wrong; and, besides, the obvious interest of the companies is, that these bonds should be salable free from all questions of equity. They are generally issued for the express purpose of raising money by their sale. To declare them subject to the equities existing in the case of ordinary bonds upon every transfer of them, would be to strike a blow at the credit of the great mass of these securities now in the market, the consequence of which it would be impossible to predict."

[1] City of Kenosha *v.* Lamson, 9 Wall. 477; Thomson *v.* Lee Co., 3 id. 327; Murrey *v.* Lardner, 2 id. 110; Spooner *v.* Holmes, 102 Mass. 503;

are due they bear interest from the time of a demand of payment and refusal;[1] that they are liens upon the land or other securities given to secure the bond;[2] that the right to recover on the same is barred by the statute of limitations, by lapse of time, sufficient therefor after the right of action accrued thereon, and not on the bond itself; and that they, when detached from the bonds, do not lose their virtue or validity, even when they are not due, and the bonds are paid off or canceled before the coupons are due.

On this subject the supreme court of the United States recently held: "Most of the bonds of municipal bodies and private corporations in this country are issued in order to raise funds for works of large extent and cost, and their payment is therefore made at distant periods, not unfrequently beyond a quarter of a century. Coupons for the different installments of interest are usually attached to these bonds, in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity, if for any cause the bonds are canceled or paid before maturity; nor their negotiable character; nor their ability to support separate actions; and the amount for which they are issued draws interest from their maturity. They then possess the essential attributes of commercial paper, as has been held by this court in repeated instances. Every consideration, therefore, which gives efficacy to the statute of limitations, when applied to actions on bonds after their maturity, equally requires that similar limitations should be applied in actions upon the coupons after their maturity. Coupons, when severed from the bonds

National Exchange Bank v. Hartford, etc., R. Co., 8 R. I. 375; Johnson v. County, 24 Ill. 75; San Antonio v. Lane, 32 Tex. 405; Arents v. Commissioners, 18 Gratt. 750; Aurora City v. West, 7 Wall. 105; Gelpecke v. City of Dubuque, 1 id. 105; Whitaker v. Hartford, etc., R. Co., 8 R. I. 47; Connecticut L. Ins. Co. v. C. C. R. Co., 41 Barb. 9; North Pennsylvania R. Co. v. Adams, 54 Pa. St. 94; Burroughs v. Richmond, 65 N. C. 234; Mills v. Jefferson, 20 Wis. 50.

[1] Sewall v. Brainerd, 38 Vt. 364; Miller v. Rutland, etc., R. Co., 40 id. 399.

[2] City of Kenosha v. Lamson, 9 Wall. 477; Lexington v. Butler, 14 id. 282.

to which they were originally attached, are, in legal effect, equivalent to separate bonds for the different installments of interest. The like action may be brought upon each of them, when they respectively become due, as upon the bond itself, when the principal matures; and to each action, to that upon the bond and to each of those upon the coupons, the same limitations must upon principle apply. All statutes of limitations begin to run when the right of action is complete; and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, while a complete right of action upon such claims exists in the holder."[1]

SEC. 257. **Ultra vires — doctrine of.**— The doctrine of ultra vires is so frequently referred to in connection with corporate contracts that a particular consideration of it seems to be here required. This doctrine, as applied at least to municipal corporations, is that they cannot be bound by any contract executed by any of their officers or agents, which is entirely beyond the scope of their powers, or entirely foreign to the purposes of their creation, or absolutely immoral or against public policy;[2] that contracts thus made are

[1] Clark *v.* Iowa City, 20 Wall. 585. See, also, De Cordova *v.* Galveston, 4 Tex. 470; Underhill *v.* Trustees, 17 Cal. 172.

The holder may sue on the coupons without being interested in or producing the bonds to which they were originally attached. See decisions in Sup. Ct. of United States, above cited.

But municipal warrants or orders, though negotiable in form and transferable by delivery, so that the holder may sue thereon in his own name, do not possess the qualities of negotiable paper, even in the hands of an innocent holder, so as to preclude inquiry into the legality of their issue, or preclude defenses thereto. Clark *v.* Des Moines, 19 Ia. 199; Clark *v.* Polk County, id. 248; People *v.* County, 11 Cal. 170; Sturtevant *v.* Liberty, 46 Me. 457; Emery *v.* Mariaville, 56 id. 315; Smith *v.* Cheshire, 13 Gray, 318; Andover *v.* Graften, ; Commissioner *v.* Keller, 6 Kans. 510.

But compare with the foregoing authorities, Hyde *v.* Franklin, 27 Vt. 185; Dalymple *v.* Whitingham, 26 id. 345; Bank *v.* Farmington, 41 N. H. 32; Inhabitants *v.* Weir, 9 Ind. 224; Taft *v.* Pittsford, 28 Vt. 286; Halstead *v.* Mayor, etc., 3 Comst. 430; S. C., 5 Barb. 218; The Floyd Acceptances, 7 Wall. 666; People *v.* Gray, 23 Cal. 125; School District *v.* Thompson, 5 Minn. 280; Philadelphia *v.* Lewis, etc., R. Co., 33 Pa. St. 38; Commonwealth *v.* Pittsburgh, 34 id. 496; King *v.* Wilson, 1 Dill. (C. C.) 555.

In the case of Everston *v.* National Bank of Newport, 13 Alb. L. J. 350, the court of appeals of New York recently *held*, that where coupons of a railroad company were made payable to bearer, they were negotiable and entitled to all the incidents of negotiable paper, such as days of grace; and that a *bona fide* purchaser of the same, after the time fixed for payment, but before the days of grace had expired, was entitled to recover on them, although they had been stolen.

[2] Martin *v.* Mayor, 1 Hill, 345; Boon *v.* Utica, 2 Barb. 104; Cornell *v.* Guilford, 1 Den. 510; Boyland *v.* Mayor, etc., 1 Sandf. 27; Dill *v.* Wareham, 7 Metc. 438; Parsons *v.* Inhabitants of Goshen, 11 Pick. 396; Vincent *v.* Nantucket, 12 Cush 103; Stetson *v.* Kempton, 13 Mass. 272; Spaulding *v.* Lowell,

absolutely void; and that no recovery can be had thereon, when the defense set up to the same is the want of power to so contract.[1]

"In favor of *bona fide* holders of securities," observes Mr. Dillon, "the corporation may be estopped to avail itself of irregularities in the exercise of power conferred, but it may always be shown that under no circumstances could the corporation lawfully make a contract of the character in question."[2] This was the early rule of the English cases, in the application of the doctrine of ultra vires to private corporations, viz.: that such corporations have the powers only which are conferred by the charter, the incorporating statutes or the constating instruments, and that they can only be bound by contracts by their agents or otherwise that are within the limits of the powers thus possessed.[3] And this seems to have been the American doctrine.

Thus it was held that a company incorporated for the purpose of establishing and conducting a line or lines of steamboats, vessels and stages, or other carriages for the conveyance of passengers between certain places, could not make a valid contract for the breaking of ice for the passage of vessels, and the towing of vessels through the track thus broken to a place other than designated, and that an action could not be maintained upon such a contract against such corporation if the defense of a want of

23 Pick. 371; Clark v. Polk Co., 19 Ia. 248; Estep v. Keokuk Co., 18 id. 199; Mitchell v. Rockland, 45 Me. 496; S. C., 41 id. 363; Anthony v. Cleveland, 12 Ohio, 375; Commissioners v. Cox, 6 Ind. 403; Inhabitants v. Weir, 9 id. 224; Smead v. R. Co., 11 id. 104; Brady v. Mayor, etc., 20 N. Y. 312; Appleby v. Mayor, etc., 15 How. Pr. 428; Cuyler v. Rochester, 12 Wend. 165; Hodges v. Buffalo, 2 Den. 110.

But it has been held that, where money has been advanced to a municipal corporation on a contract void for want of authority on the part of the corporation to make it, and the corporation afterward refuses to fulfill the contract, the party thus advancing the money may without a demand of it recover it back in an action for money had and received. Dillon v. Wareham, 7 Metc. 438. See, also, McCracken v. San Francisco, 16 Cal. 571.

[1] Dill. on Mun. Corp., § 381; Marsh v. Fulton Co., 10 Wall. 676; Thomas v. Richmond, 12 id. 349; Bridgeport v. Housatonic, etc., R. Co., 15 Conn. 475; Leavenworth v. Rankin, 2 Kans. 358.

But this doctrine seems to be somewhat qualified in Allegheny City v. McClurkan, 14 Pa. St. 81, where it was held that a municipal corporation may be liable for the unauthorized contracts of its officers, when these are publicly entered into with the knowledge of the citizens and not objected to, until the rights of third persons have attached.

[2] Dill. on Mun. Corp., §§ 108, 381, 415, 426, and notes.

[3] Earl of Shrewsbury v. North Staffordshire R. Co., 35 L. J. Ch. 156; Taylor v. Chichester, etc., R. Co., L. R., 2 Ex. 356.

power to contract was made;[1] and it has also been held that a corporation was not estopped from making a defense on the ground of ultra vires, even though it had received the consideration or benefits of the contract.[2]

What then is the present doctrine on the subject of ultra vires? Is a contract entered into on the part of a corporation void under all circumstances if it exceeds the powers conferred upon it? Is it void if it exceeds the chartered powers of the corporation, provided the corporation has received the consideration of the contract, or the benefits resulting from it? Is it void if it is a promissory note or other negotiable instrument in the hands of a *bona fide* holder, given as the consideration of a contract, or for property delivered? Would it be void if executed by an agent in excess of his authority, where the corporation has received the consideration? What remedy exists in case of the attempt to act or contract on the part of a corporation or its agents in excess of the powers conferred upon it or them, and who is entitled to it?

These are among the numerous questions presented by the doctrine of ultra vires, in its application to corporations. We will proceed to consider them and the modern doctrine relating to that subject.

SEC. 258. **Different senses in which the term ultra vires is used**—In a recent case in California, the supreme court of that state has referred to the different senses in which the term ultra vires is used. SAWYER, C. J., observed: "An act is said to be ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be ultra vires with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose when it is not authorized to perform it for that purpose,

[1] Pennsylvania Co. v. Dandridge, 8 G. & J. 248. See, also, Abbot v. Baltimore Steam Jack. Co., 1 Md. Ch. 542; Mechanics' Bank v. Meriden Agency Co., 24 Conn. 159; Berry v. Yates, 24 Barb. 199.

[2] Gage v. New Market R. Co., 18 Q. B. 457; 14 Eng. L. & Eq. 57; Preston v. Liverpool R. Co., 5 H. L. C. 605; Albert v. Savings Bank, 1 Md. Ch. 407; Ohio L. Ins. Co. v. Merchants' Ins. Co., 11 Humph. 1; Guest v. Poole R., L. R., 5 C. P. 553; Ang. & Am. on Corp., § 256, and notes.

although fully within the scope of the general powers of the corporation, with the consent of parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is ultra vires in one or the other of these senses. All these senses must be constantly borne in mind in considering a question arising out of dealings with a corporation.

"When an act is ultra vires in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is ultra vires in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case." [1]

We will proceed to consider these two propositions, and to determine, first, the effect of this doctrine of ultra vires in relation to contracts made by the corporation, but in so doing it has exceeded the authority and power which it possesses by virtue of the powers conferred upon it by law; and, secondly, its effect where contracts are made by its officers or agents in excess of and beyond the authority conferred upon them for that purpose, by the creating acts or constating instruments.

SEC. 259. **Are all contracts void that are entered into by corporations, which are ultra vires?**—In considering this question it may be proper to state that a distinction has been made between contracts executed or partly executed, and those that are not, either in whole or in part, executed.

We will present the following hypothetical case for illustration: Suppose a banking institution is duly incorporated with the ordinary

[1] The Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543.

As to the doctrine of ultra vires see, also, the English cases, East Anglian, etc., R. Co. *v.* Eastern, etc., R. Co., 11 C. B. 775; Green's Brice's Ultra Vires, 28 *et seq.*; Shrewsbury, etc., R. Co. *v.* London, etc., R. Co., 22 L. J. Ch. 682.

In the latter case it is observed: "The great undertakings of these (*i. e.*, railway and similar) companies could not be carried out by private enterprises, and parliament has therefore, with a view to the public good, authorized the constitution of large bodies, acting by directors, for the purpose of carrying them out. But these bodies have no existence independent of the acts which create them, and they are created by parliament with special and limited powers, and for limited purposes. Whether parliament has wisely limited their powers for purposes of their incorporation is not for us to consider. The fact of their being endued with such powers and incorporated for such purposes only shows that parliament did not think fit to intrust them with more extended powers, or to incorporate them for other purposes."

powers and privileges of such a corporation, and it is finally resolved by such bank, in the usual and authorized mode of corporate action, that it will embark in the purchase of grain; and that to such a course and policy on the part of the corporation there is not a dissenting stockholder, or other person having any interest in the same. In carrying out this resolution, we will suppose that the corporation purchases, principally on time, a large quantity of wheat, for which it pays the seller only a small portion of the consideration, and gives its obligation in the form of a negotiable note or bill for the balance. If the corporation should be successful in the investment, a large sum may be realized and the stockholders enriched thereby; the obligation to pay for the wheat would be canceled, and the members of the corporation pocket the dividends thereby produced, with entire satisfaction. But suppose the investment turns out unfortunate, and a large loss is sustained, and that the obligation given for the wheat is repudiated, on the ground that the corporation had no authority to make such a contract; that the excess of powers in this respect must be presumed to be known by the other party to the contract; that the statutes and constating instruments are public acts and records, of which parties dealing with it are required to take notice; and that such acts or instruments clearly show that the corporation was exceeding the powers conferred upon it. Can such a defense be maintained in an action against the bank on the obligation given?

If maintainable against the payee, would it be against a *bona fide* holder, without notice of the purposes for which the note or bill was given? We will proceed to consider these questions.

SEC. 260. In the opinion of the author such a defense cannot be made under such circumstances. It would appear exceedingly unjust that a corporation should be permitted to take the consideration of such a contract, and then, in the event of an unsuccessful investment, repudiate the same.

Against the doctrine of ultra vires, in such cases as a defense, COMSTOCK, C. J., observes: "If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it

to say, 'this is not our dealing,' and the money used in the dealing may be unconditionally reclaimed from whatever parties have received it for value; while the injured dealer must seek his remedy against agents, perhaps, irresponsible or unknown. Corporations may thus [if the doctrine of ultra vires in such cases is adopted] take all the chances of gain, without incurring the hazard of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of the agent's unauthorized dealings is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. * * *

"But is it true that all contracts for purposes not embraced in their charters are illegal, in the appropriate sense of the term? This proposition I must deny. Undoubtedly, such engagements may have vices, which sometimes infect the contracts of individuals. They may involve a *malum in se*, or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases,[1] but it was never established, and is not now received in the English courts.[2]

"The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is not only an entire absence of adjudged cases, even of judicial opinion or *dicta*, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words 'ultra vires,' and 'illegality,' represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of directors and under the corporate seal, for the building

[1] The East Anglian R. Co. *v.* The Eastern Counties R. Co., 7 Eng. L. & Eq. 509; Macgregor *v.* Deal, etc., R. Co. 16 id. 180.

[2] The Mayor, etc., *v.* The Norfolk R. Co., 30 Eng. L. & Eq. 120; Eastern Counties R. Co. *v.* Hawkes, 35 id. 8. See, also, *post*, § 267 and notes.

of a church or college, or an alms-house, would be clearly ultra vires, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be ultra vires, but no wrong would be committed and no public interest violated. So, a manufacturing corporation may purchase ground for a school-house, or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution among them. Such dealings are outside of the charter; but so far from being illegal or wrong, they are, in themselves, benevolent and praiseworthy. So, a church corporation may deal in exchange. This, though ultra vires, is not illegal, because dealing in exchange is not, itself, an unlawful act."[1]

SEC. 261. It is evident that by the plainest principles of justice, corporations making contracts in such cases, and receiving the consideration and the full benefits of the same, should not be allowed to defeat the obligations made by them therefor; or, at least, should not be permitted with impunity to appropriate the property of another received by virtue of such a contract, and, under a plea of ultra vires, defeat any recovery therefor.

SEC. 262. The right of recovery in such cases is sometimes made to rest upon the unanimous consent and approval of the stockholders. But in case this is not expressly given, it would probably be presumed from an acceptance of the fruits and profits of an enterprise thus entered upon ultra vires, and of the benefits and consideration of a contract made by the corporation in the prosecution of such enterprise.

This would, undoubtedly, be a ratification of the contract by them. But if such corporation by itself or its agents engages in such an enterprise, and in the usual way issues its obligations, would the failure of a member to give his express or implied assent thereto enable him or the corporation to make ultra vires a defense to such an obligation, the consideration of which has been received and appropriated by the corporation, for a purpose foreign to the original objects and purposes of its creation? If, as has been suggested, the contract has been executed and the

[1] Bissell v. The Michigan, etc., R. Co., 22 N. Y. 264-269.

corporation has received the consideration of the same, and more especially if the stockholder has, with a knowledge of the transaction, acquiesced therein, and received his share of the dividends and profits of the enterprise, this would, undoubtedly, conclude him and the corporation from a defense on the ground of ultra vires. But a member, under other circumstances, has an unquestioned right to restrain the execution of an undertaking, or a contract, ultra vires the corporate powers, which we will hereafter consider.[1]

SEC. 263. **Distinction between executed and unexecuted contracts in relation to the doctrine of ultra vires.**—We have noticed that corporations may enter into contracts that will become binding, although such contracts may exceed its authorized powers. Whether absolutely void or not may depend upon the question whether such contract is prohibited by the positive provisions of the statute or public policy. If it exceeds the express or implied powers of the corporation, it does not, from the preponderance of authority, necessarily follow that it is void or even voidable. A stockholder may, in such a case, restrain the act. But in the absence of such proceeding, and especially where the act has received the unanimous assent of the corporators, it would be treated as valid and binding.

Again, if the corporation, by virtue of a contract, has received and appropriated the fruits of a contract, or appropriated property acquired thereby, it would not usually be heard to object that it had not authority to act. To allow such a plea as a defense to an obligation would be to allow it to take advantage of its own wrong. It has been replied to such a conclusion, that a party dealing with a corporation is supposed to know of the extent of its powers, and that, therefore, a contract entered into with the corporation, in excess of such powers, makes him equally a wrongdoer But such acts in excess of corporate authority are not tainted with criminality, nor are they necessarily illegal, as we have seen, on that ground.

[1] It may be the duty of the member under such circumstances to restrain the unlawful act in such cases, which he may do by injunction; and in the absence of such proceeding, be estopped from insisting upon the defense of ultra vires as he might be presumed to acquiesce in the execution of contracts to which he expressed no dissent, if executed in the usual manner. On the subject of injunctions, see *post*, § 408.

On the other hand they may be entirely laudable and praiseworthy, although in excess of chartered powers. Can a corporation, then, receive the consideration of an obligation, or the property of another, even for purposes foreign to its institution, and appropriate the same, and refuse payment therefor? Or can the corporation in case of an agreement, made in excess of corporate powers, but not executed, no consideration having actually passed between the parties (such as a contract between a railroad company and an individual, by which the latter is to construct steamboats, to be operated by the company in a manner not embraced within the powers conferred upon it), refuse to comply with such agreement on its part, and make a successful defense to any claim for damages thereon by the other party, by reason of the breach of such contract, on the ground that such contract is ultra vires?

§ 264. In answer to the first question, and to illustrate the law on the subject, we will suppose that a corporation is duly organized to construct and operate a railroad from Chicago to Cairo, in the state of Illinois, and that having completed said road it proposes to connect the same with a line of steamboats, to be constructed and operated on the Mississippi river, between Cairo and New Orleans. To carry out this enterprise entirely foreign to the purposes of its organization, we will also suppose that such corporation, in the usual way, enters into a contract with an individual to construct a number of steamboats, and that pursuant to said contract said steamboats are constructed and operated as aforesaid by said company; that the consideration for such boats, given by said company, in pursuance of the provisions of the agreement, was its bonds executed and issued in the usual way, secured by a mortgage on its railroad; that said boats were insured by the company; that subsequently said company received the amount of the cost of such boats from insurance companies, on account of a total loss of the same; that the company failed to pay such bonds when due; that a suit is brought against the company to recover the same, and that the company interpose an answer as a defense, that such a contract was ultra vires, and, therefore, absolutely void. Would this be a good defense under the circumstances of the case? Would the rights of the plaintiff be

different if he was a *bona fide* holder of the bonds by assignment of the same before due, having purchased them of the payee, without any actual notice of the consideration for which they were given, or any knowledge of the corporate powers of the maker, except such as may be presumed from the creating acts of the corporation?

In a recent case in Illinois, the questions we have presented have been ably considered by Chief-Justice LAWRENCE. He says: "It is said by counsel for the complainant that a corporation is not estopped to say in its defense that it had not power to make a contract sought to be enforced against it, for the reason that if thus estopped its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true, but when, under cover of this privilege, a corporation seeks to evade the payment of borrowed money on the ground that although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of ultra vires to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality. Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied (as when under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed), can be made the means of enabling them indefinitely to extend their powers. If it were true it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, and after whatever mischief may belong to the performance of an act ultra vires has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so, but on the application of stockholders, or any other person authorized to make the application, a court of chancery would interfere and

forbid the execution of a contract ultra vires. So, too, if a contract ultra vires, is made between a corporation and another person, and while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power. Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter the company would have no power to build steamboats, for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor and accepted and used by the railway, could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment, on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that, instead of having a vessel built by a contractor, it employs a superintendent to build it, and hires mechanics by the day, could it escape the payment of their wages on the ground that it had employed them in a work ultra vires? In cases of such character, courts simply say to corporations, you cannot, in this case, raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter. We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions are in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action whenever it is a question of restraining corporations in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though ultra vires, of which they have received the benefits." [1]

[1] Bradley v. Ballard, 55 Ill. 417. See, also, Gas Co. v. San Francisco, 9 Cal. 453.

SEC. 265. **When neither party can avoid the contract, though ultra vires.** — If contracts between corporations and individuals are absolutely void because ultra vires, then this defense could be set up by the individual as well as the corporation; and where it would be greatly to the interest of the individual so to do, the corporation, though suffering great pecuniary loss thereby, could not avoid such a defense on the part of the other contracting party. But it is well settled, I apprehend, by the preponderance of authority, that neither the corporation nor an individual, entering into a contract with it, can avoid a contract of sale and purchase of property where the property is delivered, nor can the individual reclaim the property sold, or the corporation avoid the payment of the price of the same, on the ground that it had no authority to make the contract so long, at least, as it retains it and enjoys the benefit of the contract.[1]

SEC. 266. Common principles of justice would require a corporation to pay for property actually received and appropriated, to repay money borrowed and expended, and to pay for labor and services actually received. If the agents or officers make ultra vires contracts, they may be personally responsible to the stockholders for damages sustained, by reason of such contracts, and they may be restrained from entering into or executing such contracts by the stockholders, or perhaps creditors, interested in the matter.

But when such a contract is once executed, it would appear consonant with principles of justice and equity to sustain the contract, where the corporation has received the consideration, though executed on the part of the corporation in excess of authority of either the agents executing the same, or the corporation.[2]

This doctrine seems well sustained by the current of modern decisions. In many cases it has, it is true, been held that on

[1] Parish *v.* Wheeler, 22 N. Y. 494; Bissel *v.* The Michigan, etc., R. Co., id. 258; White *v.* Franklin Bank, 22 Pick. 181; Tracy *v.* Talmage, 14 N. Y. 162; De Graff *v.* American Linen, etc., Co., 21 id. 124; Fester *v.* La Rue, 15 Barb. 323; Gould *v.* Town of Oneonta, 3 Hun, 401; Hazelhurst *v.* Savannah, etc., R. Co., 43 Ga. 54; Southern L. Ins. Co. *v.* Lanier, 5 Fla. 110.

[2] Zabriskie *v.* C. C., etc., R. Co., 23 How. 381; Cary *v.* Cleveland, etc., R. Co., 29 Barb. 35; Argenti *v.* San Francisco, 16 Cal. 255; McCluer *v.* Manchester, etc., R. Co., 13 Gray, 124; Chapman *v.* M. R., etc., R. Co., 6 Ohio St. 137; Hale *v.* Mutual Fire Ins. Co., 32 N. H. 297; Railroad *v.* Howard, 7 Wall. 413.

technical grounds a recovery could not be had on the contract itself, where it was ultra vires of the corporation, but that a recovery might be had for the consideration of the contract thus entered into. In other cases it has been maintained that where corporations have received the benefit of such contracts, they should be required to perform them, if they are not against positive law or public policy.[1]

It was observed by BACON, J., in the New York court of appeals, on this subject, as follows: "If it be conceded that the defendants had no power to enter into the contract of sale in this case, and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet, having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, as in the case of a corporation when seeking to escape responsibility on the plea of ultra vires, for acts deliberately done with all the usual and needful formalities, and where they have received the entire benefit they contracted for, such a defense should no longer be tolerated in our courts. Where the question is merely as to the power to contract, a party who has had the benefit of the contract should not be permitted, especially where there is no unlawful intent charged upon the other party, and he is in no sense in *pari delicto*, to question its validity. To deny relief to a plaintiff thus situated, would be substantially to secure to the party deliberately violating one of the laws of its existence, and when no guilty complicity can be charged upon the other party, the fruits of an illegal transaction, and operate as a premium upon repudiation and fraud."[2]

[1] Chicago Building Soc. *v.* Crowell, 65 Ill. 458.

[2] De Groff *v.* American, etc., Co., 21 N. Y. 127.

In Parish *v.* Wheeler, 22 id. 503. COMSTOCK, C. J., observes, in relation to this question: "There is certainly no moral turpitude if a railroad corporation buys a steamboat or builds a church, nor is there any legal turpitude. It may be an excess of power or a private breach of trust, in respect to its stockholders. The latter may complain or the state may interpose, but corporations themselves, like individuals, in dealing with other parties, must live up to the rules of common honesty. * * * Contracts with cor-

SEC. 267. **Form of the action, in case of ultra vires contracts.** — It has in some cases, been held, that where the contract is ultra vires,

porations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, I am willing to agree, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and therefore a breach of private trust.

Executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require. * * * The most favorable statement of the particular matter now in question is, that the railroad corporation, in excess of the powers conferred upon it by its charter, purchased and paid for a steamboat and several canal boats; that being in possession and use of the property, in connection with its regular business, it mortgaged the same property to its creditors, the plaintiff, taking back charter-parties for a limited period, and also a stipulation for a reconveyance, if the debt should not be paid at the time agreed on; that the plaintiff, taking the usual course in such cases, caused a part of the property to be sold after a default had occurred, and received the proceeds of that sale, which nearly or quite satisfied the debt. In all this I can see nothing unlawful except the want of legal power or right to buy the property.

But it was actually bought, paid for and delivered, and, therefore, become a part of the estate and assets of the company. The company could sell or pledge it to a creditor, and could redeem the pledge by paying the debt. In acquiring the ownership of such property, the corporation may have usurped a right not granted by its charter. But the acquisition was, nevertheless, a fact which no legal refinement can deny. It was a fact too, having all the legal relations and incidents of any other fact of ownership. I think it will not be questioned, that an execution creditor of the company could levy on this property and sell it for the satisfaction of his debt, and having thus obtained a satisfaction, I do not think that he could deny that he was paid, upon any theory of excess of corporate power, and levy again upon other property.

So, if the creditor, instead of proceeding to judgment and execution for his debt, takes a pledge or mortgage, and, by the exercise of the power of sale, obtains the cash for his demand, I do not see how he can raise the inquiry whether the corporation debtor violated the trust duty, which it owed to its shareholders in the purchase of the chattels pledged or mortgaged.

So long as no one else questions the title thus acquired, and the property is made productive in the satisfaction of the debts, it would be strange if the creditor can, upon such ground, claim that the debt still exists. And such is, in effect, this case. The security of the plaintiff, as I have said, was in the nature of a mortgage. The stipulation to reconvey on payment of his claims provided for nothing beyond the legal result of the transaction. The reconveyance, it is true, was to be made to the appointee of the corporation; but that clause considered by itself involved nothing illegal, or even ultra vires. The plaintiff actually sold a part of the property for the payment of his debt, and he received the money. No one but himself questions, or can question his right to make the security available in that manner. He does not pretend or suggest that he cannot hold the money thus obtained. On the contrary, he insists upon retaining it against all the world; but at the same time claims that his debt is neither paid nor reduced. Much has been said in the books (some times I think without reflection) about the powers of corporations and the consequences of exceeding those powers. But no authority can be found to justify the position of the plaintiff in respect to the matter here considered." See, also, Bissel *v.* Michigan, etc., R. Co., 22 N. Y. 258; Hazelhurst *v.* Savannah, etc., R. Co., 43 Ga. 54; Bradley *v.* Ballard, 55 Ill. 413. In Bissel *v.* The Michigan, etc., R. Co., 22 N. Y. 258, SELDEN, J., in discussing the question makes a distinction based upon knowlledge, or want of knowledge, of the

but the corporation has received property, or the consideration of a contract, and refuses to fulfill its contract, or to pay its obliga-

party dealing with the corporation. He observes: "There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder, because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

"The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

"A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act, are afterward sought to be estopped from settting up that their act was unauthorized. It was insisted by counsel in the case of Regina *v.* White, 4 Ad. & El. (N. S.) 101, that for public reasons, officers so situated were not estopped; but Lord DENMAN said: 'We have held that this is true only of a statute the contents of which are publicly known; such a statute is to have effect whatever dealings may take place; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterward dealing, such an act cannot prevent the estoppel arising from that subsequent dealing.' This doctrine, which was also held in the case of Doe *ex dem.* Levy *v.* Horne, 3 Ad. & El. (N. S.) 757, will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defense to an action brought upon it.

"In referring to the cases which support these views, I will notice the English cases first. There are three classes of cases in England in which the question of ultra vires arises, viz., first, cases in which one or more of the shareholders seeks to restrain the officers of the corporation from engaging in transactions unauthorized by the charter; second, actions brought by third persons against corporations to enforce their contracts, in which the defense relied upon is, that in making the contract the corporation exceeded its corporate powers; and third, similar actions, in which the defense is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors or managing officers by deed.

"These three classes of cases differ materially in their nature and principles, and if we would avoid confusion must be kept entirely distinct in investigating the subject. Those of the third class have no bearing upon the question we are discussing. There

tions, given as the consideration, no recovery can be had upon such contract; but that the party thus contracting with the corporation, and delivering such property or paying such consideration, is entitled to recover the value of the property thus delivered or the consideration paid, on an implied undertaking on the part of the corporation to pay for the value or amount of the same, though the contract itself is void as being ultra vires. This doctrine is entirely technical and can hardly be considered as

are in England a class of corporations organized under general laws, which do not specify the manner in which the objects and purposes of the incorporation are to be effected, but leave this to be arranged by a "deed of settlement" between the corporators themselves. By this deed the companies prescribe and limit the powers and functions of their various officers, so far as they are left uncontrolled by the statute and the general laws of the kingdom. Now it is plain that there is no analogy between an act which merely transcends the limits of this deed of settlement and one which violates the provisions of the organic act. The deed of settlement is the private act of the shareholders, and its provisions have respect solely to their private interests. It is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved, when the question is, whether the officers have exceeded the authority conferred by this deed. The case of the Royal British Bank *v.* Turquand, 5 El. & Bl. 248, is one of this class of cases. By comparing the language of Lord CAMPBELL in this case with that used by him upon another occasion, we shall obtain a clear view of the distinction here adverted to. In the case cited the action was upon a bond signed by two of the directors, and the question was, not whether the giving of the bond exceeded the powers which the corporation itself had a right to assume, but whether it was authorized as between the shareholders and the directors by the deed of settlement. Lord CAMPBELL, in delivering his opinion, said: 'A mere excess of authority by the directors, we think, would not amount to a defense.' Of course, by this was meant merely an excess of authority by the directors as the agents of the stockholders, and not an unauthorized assumption of power as between the corporation and the public.

"In The Mayor of Norwich *v.* The Norfolk Railroad Company, 30 Eng. Law & Eq. 120, the same learned judge fully recognizes the distinction I take, and shows that by the remark just quoted he by no means meant to say that corporations were bound by contracts which are ultra vires, as between them and the public. He then says: 'The mere circumstance of a covenant by the directors in the name of the company being ultra vires as between them and the *shareholders*, does not necessarily disentitle the covenantee to sue upon it. * * * But suppose that the directors of a railway company should purchase a thousand gross of green spectacles as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors: * * * this would be an *illegal* contract to misapply the funds of the company, and the illegality might be set up as a defense.'

"The phrase 'ultra vires' is applied in the English cases both to acts which simply exceed the powers conferred by the deed of settlement upon the officers as the agents of the shareholders, and acts which transcend the powers conferred by law upon the entire corporation. This indiscriminate use of the phrase is calculated to mislead, unless the distinction referred to is observed. It is evident that the class of cases, to which that of Royal British Bank *v.* Turquand belongs, have no bearing upon the question under consideration, and hence they will be no further noticed."

sound in principle. Such a doctrine only changes the form of the remedy and does not affect the substantial rights of the parties. In fact a claim in such a case, on a *quantum meruit*, or *quantum valebat*, might give the individual even more than on the contract; and if the same amount might be recovered in either form of action, no practical benefits would be secured by the adoption of the doctrine, that the contract, being in excess of authority, is void.[1] But the distinction has, however, been frequently made, both in this country and in England.

Mr. Brice observes: "To say that a corporation cannot sue or be sued upon an ultra vires agreement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different."[2]

In an action by a corporation in New York, for money loaned, where the defense was, the want of power in the company to make loans, the supreme court of that state uses the following language: "It ill becomes the defendants to borrow from the plaintiff one thousand dollars for a single day, to relieve their immediate necessities, and then to turn around and say, 'I will not return you this money, because you had no power in your charter to lend it.' Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the state of Connecticut [where the corporation was created] the extent of the plaintiff's chartered privileges. We shall

[1] It is affirmed by Mr. Brice that, "though no action will lie against a corporation merely on the ground that it has received and adopted the benefit of a contract entered into without due formalities on its part, yet under certain exceptional circumstances it may be sued on the consideration so received, and, *e contrario*, it seems that it may always maintain assumpsit or debt against a person who has received from it the benefit of such a contract. * * * It was at one time thought that, though a corporation could not be sued on a contract whilst it remained executory, they might be so on one which had been executed; but the distinction does not now exist." Green's Brice's Ultra Vires, 371; East London N. W. v. Bailey, 4 Bing. 283; Mayor, etc., v. Charlton, 6 M. & W. 815; Paine v. Strand Union, 8 Q. B. 326. See, also, Moss v. Rossie Min. Co., 5 Hill, 137; Peterson v. Mayor, etc., 17 N. Y. 449; Hooker v. Eagle Bank, 30 id. 83; McCutcheon v. Steamboat Co., 13 Pa. St. 13; Hague v. City of Philadelphia, 48 id. 527; City of Baltimore v. Reynolds, 20 Md. 1; Richard v. Warren Co., 31 id. 381; Zoetman v. San Francisco, 20 Cal. 96; Thomas v. Dickenson, 12 N. Y. 364; Curtis v. Leavitt, 15 id. 47; Bonesteel v. Mayor, etc., 22 id. 162.

[2] Green's Brice's Ultra Vires, 618.

lose our respect for the law when it so far loses its character for justice as to sanction the defense here attempted."[1]

SEC. 268. But the doctrine we have been considering would be applicable where the power assumed by the corporation is expressly prohibited by law or is against public policy.[2]

Thus, in an action on a note issued by a corporation, where such act was expressly prohibited, it was said by BRONSON, J., that, "as the issuing of notes was expressly prohibited by law, it is impossible to maintain that they are valid securities. To hold that they can be enforced against the bank would be going very far toward defeating the end which the legislature had in view. * * * The legal liability on account of which the notes were issued still remains; but the notes themselves are void."[3]

SEC. 269. **The doctrine of ultra vires, applied to agents.**—It will be evident from what has been said in reference to the doctrine of ultra vires, that the general principles of this doctrine would be applicable to all agents of corporations. Their authority to act, as we have seen, cannot exceed the corporate powers, and may be less; but where they are less, and where the agent exceeds the authority conferred by law, the corporation, like any other principal, may expressly or by its acts ratify the acts of the agent.[4]

[1] Steam Nav. Co. *v.* Weed, 17 Barb. 378. See, also, Argenti *v.* City of San Francisco, 16 Cal. 255; Bank *v.* Hammond, 1 Rich. L. 281; Southern, etc., Co. *v.* Lanier, 5 Fla. 110; Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Potter *v.* Bank of Ithaca, 5 Hill, 490; Suydam *v.* Morris Canal, etc., id. 491; Sackets Harbor Bank *v.* Lewis Co. Bank, 11 Barb. 213, Tracy *v.* Talmage, 14 N. Y. 162.

[2] Curtis *v.* Leavitt, 15 N. Y. 94.

[3] Leavitt *v.* Palmer, 3 Comst. 19. But see *post*, § 270; State Board of Agriculture *v.* Citizens' Street R. Co., 47 Ind. 407; Kneeland *v.* Gilman, 24 Wis. 39.

[4] See *ante*, §§ 199, 207, and ch. 6.

The presumptions against corporations, on the ground of acquiescence or implied ratification, is illustrated by the case of Zabriskie *v.* Cleveland, Columbus and Cincinnati Railway, 23 How. 381, where the facts were as follows:

By the general railway law in Ohio, one railway company was allowed to aid in the construction of other lines, by subscriptions to the capital stock of the companies, provided that in a meeting of the stockholders, called for that purpose, two-thirds of the stock represented should assent thereto. And by a subsequent act, it was provided that any existing company might accept this provision; and by filing a certificate of such acceptance with the secretary of state make it a part of its charter. In this case the defendants, without having complied with either of the foregoing conditions, made a guarantee of $400,000, of the bonds of the Columbus, Piqua and Indiana Railway.

A bill was brought by the plaintiff, a member of defendants' company, to

SEC. 270. **The doctrine of ultra vires in cases of negotiable instruments.** — We have already indicated the effect of acts ultra vires, on contracts made by private corporations, with other parties. Would *bona fide* assignees of negotiable instruments, such as bonds, coupons or notes, stand in any better position than the payee or original holder of these instruments?

If the corporation had authority to issue these instruments for any purpose, although in respect to the particular issue it may have been in excess of authority, the purchaser would be protected if he purchased the same in good faith, for a valuable consideration and without notice actual or constructive of the particular informality or excess of authority on the part of the corporation or its agents.

If the corporation or its agents, having authority to issue its notes or bonds, either by the express provisions of law or its constating acts, or implied authority derived therefrom, such notes or bonds may still be issued for some unlawful purpose, and in that respect be considered ultra vires. But in the hands of an inno-

restrain them from paying the interest on the bonds so guaranteed by them, upon the ground that the defendants' directors had exceeded their authority in making the guaranty. Some of the other stockholders by permission of the court below became defendants in the suit. The court held, that, as between the parties to the present suit, the acceptance of the provisions of the general railway law and of the subsequent statute might be presumed from the conduct of the corporators, in not sooner taking steps to nullify the action of the directors in making the guaranty; and that it was not competent for the corporation, after having made such guaranty, received the benefits of it, and allowed the bonds to go into general circulation on the faith of its responsibility, now to repudiate them upon the ground of their own omission to comply with the requirements of the statute. And especially were the bonds binding upon the defendants since the guaranty by the directors had been expressly ratified by a resolution of the stockholders at a meeting held subsequently, and at this meeting the plaintiff's stock was represented.

In Bargate *v.* Shortridge, 5 H. L. C. 297, Lord ST. LEONARDS said: "It does appear to me that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I propose to put it to your lordships, in point of law, is this: the question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

cent holder, and especially, as we have seen, where the corporation has received the consideration therefor, they could not defeat the claims of the holder, on the ground that they exceeded their authority in executing it.

If there is nothing on the face of negotiable instruments executed by a corporation to indicate that they are ultra vires, and it had power to issue such instruments in the conducting of its legitimate business, a defense on that ground could not be set up to defeat a recovery thereon by a *bona fide* holder for value, without notice of the excess of authority in issuing them for the particular purpose for which they were issued.[1]

But where two distinct railroad companies consolidated without authority, and they were placed under the same management, it was held that the indorsee of a note given by the managers of the consolidated company for the purchase of a steamboat could not recover on it.[2]

[1] Monument Bank *v.* Globe Works, 101 Mass. 57; Attorney General *v.* Insurance Co., 9 Paige, 470; Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258; Mechanics' Banking Association *v.* White Lead Co., 35 id. 505; Lexington *v* Butler, 14 Wall. 282; Morford *v.* Farmers' Bank, 26 Barb. 568; Bridgport City Bank *v.* Empire, etc., Co., 30 id. 421; Central Bank *v.* Same, 26 id. 23; Bank of Genesee *v.* Patchin, 3 Kern. 309.

As a general rule, a corporation, unless restrained by law or the constating instruments, may, as incident to its business, receive and transfer notes and bills. Buckley *v.* Briggs, 30 Mo. 452; Frye *v.* Tucker, 24 Ill. 180; Hardy *v.* Merriweather, 14 Ind. 203; Lucas *v.* Pitney, 3 Dutch. 221.

[2] Pearce *v.* Madison, etc., R. Co., 21 How. 441.

In this case Justice CAMPBELL observed: "Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In McGregor *v.* The Official Manager of the Deal & Dover Railway Co. (16 L. & Eq. 180), it was considered that a railway company incorporated by act of parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of parliament, must be taken to be known to the whole world. In Coleman *v.* The Eastern Counties Railway Co., 10 Beav. 1, Lord LANGDALE, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord LANGDALE said: 'Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power

SEC. 271. **Necessary or implied powers not ultra vires.**—It has been affirmed that a power to make notes or bills, or to

to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

"'There is, however, no authority for any thing of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of parliament, under which those acts were done, they furnish no authority whatever. In the East Anglian Railway Company *v.* The Eastern Counties Railway Company (11 C. B. 803), the court say the statute incorporating the defendants' company gives no authority respecting the bills in parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of parliament, and not within the scope of the authority of the company as a corporation, and is therefore void.'

"We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of Head *v.* Providence Insurance Company (2 Cr. 127), and has been reaffirmed in a number of others that followed it. (Bank of Augusta *v.* Earle, 13 Pet. 519; Perrine *v.* Ches. & Ohio Railroad Company, 9 How. 172).

"It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, had the corporation the capacity to make the contract, in the fulfillment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

"In Rutland and Burlington Railway Company *v.* Proctor, 29 Vt. 93, where the plaintiffs, a railway company, chartered with the usual privileges and limitations, in order to compete in business and improve the profits of their road, in all probability in good faith, purchased the boats and appurtenances of a corporation formed for carrying freight and passengers on Lake Champlain, and subsequently sold one of these boats and furniture to the defendants, and after the sale repaired the boat and furniture at a machine shop purchased of the transportation company, and brought an action for such furniture and repairs, it was held that they could recover. The court, REDFIELD, C. J., said: 'The defense is, that the contract of purchase by which the plaintiff's company acquired the title of this boat and furniture, sold the defendants, and of the shop at which the repairs were done, was beyond their powers, or as denominated in the books, ultra vires. It does not appear that the stockholders of the plaintiffs' company have ever objected to their making the purchase, or running the boats in connection with their road.

"'If we regarded the question properly before the court for determination, we should not at first view, certainly, be inclined to question that such a purchase is beyond the powers of the company. And if the stockholders had applied to a court of equity at the time, to have the directors enjoined from making the purchase, the current of English decisions would probably have justified the injunction. And possibly had the state interfered by way of *scire facias* or *quo warranto*, the excess of power thus exercised by the company might be regarded as sufficient reason for revoking their charter. We say this may possibly be so regarded, but it is not common in practice for the courts

accept bills, is not one of the incidents of a corporation; that the right to do so must be given either by the provisions of the law or by the constating instruments, although it may be conferred either by express provisions or by implication.[1]

to declare the forfeiture of a railway charter when the directors have proceeded in good faith, and the property of the company is not brought in peril, but no such step has been taken, nor is this an action by which the company are sought to be charged for a contract beyond the fair scope of their charter.

"'The defendants seek to make this defense upon the ground that the excess of power thus assumed by the company is illegal, and renders all contracts connected with the transaction inoperative by reason of such illegality.

"'If there had been a positive prohibition of entering into a particular class of contracts, and especially if such contracts had been declared void by the charter of the company, or the general laws of the state, most unquestionably no action would lie upon the prohibited contract.

"'But when no such prohibition exists, and it is only by construction of the charter that a class of contracts are declared to be beyond the powers of the company, and when upon this point there is such reasonable ground of doubt as to induce a court to suppose the directors may have acted in good faith, and where the question is raised by one having no interest in it, except for purposes of unjust advantage, courts have never been inclined to listen to the objections.

"'In the present case, the most favorable view for the defendants, as it seems to us, is that the directors of the plaintiffs' company exceeded their powers in making the purchase, and that therefore the title of the boats and apparatus did not vest in the company, and consequently, that the funds which the directors appropriated for the purpose, were misappropriated, and the directors may be compelled to account for them to the company, for the benefit of the stockholders. And possibly the funds so misapplied might have been pursued into the hands of the transportation company by showing the insolvency of the directors; but this must have been done at once, and any considerable acquiescence in the transaction will prevent the stockholders or the company from pursuing the funds. And in that case the title to the property will have passed from the transportation company, *prima facie*, into the directors as natural persons. In such a state of the title the directors might most undoubtedly dispose of the property, and collect the avails as a legitimate mode of restoring the funds misapplied to the company. And for this purpose they might most unquestionably take the securities upon sale of the property, payable to the company, or stipulate that the purchaser should pay the company. And this, so far from being a continuance of the perversion of the charter powers, is the surest and only obvious mode of restoring the funds to their proper channel.

"'The only wrong in the directors is in having exceeded their powers, and the transaction with the defendants, so far as it goes, will tend to restore a portion of the money to its rightful proprietor; and of this the defendants ought not to complain, as they are confessedly solicitous to bring the directors of the plaintiffs' company back to their legitimate functions. And if they should dispose of all the property purchased in this mode, in the manner this is sold to the defendants, it will go far to restore them to their appropriate place, — the treasury of the plaintiffs, — for the benefit of the company and its stockholders.'"

[1] Halford *v.* Cameron, etc., R. Co., 16 Q. B. 442; 20 L. J. Q. B. 160; Agges *v.* Nicholson, 1 H. & N. 165; 25 L. J. Ex. 348. See, also, Peruvian R. Co. *v.* Thames, etc., Co., L. R., 2 Ch. 617; Green's Brice's Ultra Vires, 155.

But in this country at least no question is better settled upon authority than that a corporation not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note, payable either at a future time or on demand, when such note is given for any of the legitimate purposes for which the company was incorporated.[1]

And it is also now well settled, that a power granted to a corporation, to engage in a certain business, carries with it the authority to act, precisely as an individual would act, in carrying on such business, and that it would possess for this purpose the usual and ordinary means of accomplishing the objects of its creation in the same manner, as though it were a natural person. Thus, if incorporated for the purpose of building a bridge, it may contract a debt for labor or materials to be used thereon, or for the land on which it is to be built. And it may give as evidence of its indebtedness therefor its note, bond or mortgage. Or it may borrow money for this purpose, and execute a valid note or bond, and mortgage to secure the same.[2]

But a corporation would ordinarily have no authority to assume the debt of another, and issue a note therefor, nor to make or indorse notes or bills merely for the accommodation of another.[3]

[1] Police Jury *v.* Britton, 15 Wall. 566; Moss *v.* Averell, 10 N. Y. 449; Richmond, etc., R. Co. *v.* Snead, 19 Gratt. 354; Story on Bills of Exch., § 79; Edwards on Bills, 77; Barry *v.* Merchants' Ex. Co., 1 Sandf. Ch. 280; Fay *v.* Noble, 12 Cush. 1; Munn *v.* Commission Co., 15 Johns. 44; Olcott v. Tioga, etc., R., 40 Barb. 179; Mechanics' Association *v.* White Lead Co., 35 N. Y. 505; Lucas *v.* Pitney, 3 Dutch. 221; Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Bradley *v.* Ballard, 55 Ill. 413; Union Bank *v.* Jacobs, 6 Humph. 515.

[2] Barry *v.* Merchants' E. Co., 1 Sandf. Ch. 280.

It may also, without any special authority, make a note or draft, or accept a draft, for such a purpose, the indebtedness therefor being contracted in the pursuit of the legitimate business of the corporation. Story on Bills of Exch., § 79; Edwards on Bills, 77. See, also, Munn *v.* Commission Co., 15 Johns. 44; Moss *v.* Oakley, 2 Hill, 265; Mott *v.* Hicks, 1 Cow. 513; Mead *v.* Keeler, 24 Barb. 20; Partridge *v.* Badger, 25 id. 146; Olcott *v.* Tioga, etc., R. Co., 40 id. 179; Barker *v.* Mechanics' Ins. Co., 3 Wend. 94; Mechanics', etc., *v.* White Lead Co., 35 N. Y. 505; Ketchum *v.* Buffalo, 4 Kern.; Barnes *v.* Ontario Bank, 19 N. Y. 152; Hardy *v.* Merriweather, 14 Ind. 203; Union Bank *v.* Jacobs, 6 Humph. 515; Lucas *v.* Pitney, 3 Dutch. 221; Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Commercial Bank, etc., *v.* Newport Manuf. Co., 1 B. Monr. 14; Bank of Chillicothe *v.* Chillicothe, 7 Ohio, 31; Hamilton *v.* New Castle R. Co., 9 Ind. 359; Bradley *v.* Bullard, 55 Ill. 413; Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

[3] Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144; Smead *v.* Indianapolis, etc., R. Co., 11 Ind. 104; Bank of Genesee *v.* Patchin Bank, 3 Kern. 309; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 id. 421; Farmers' Bank *v.* Empire Stone Dressing Co., 5 Bosw. 275.

Nor can an insurance company issue bonds in order to lend its credit.[1]

But the power to borrow money carries with it by implication authority to mortgage the corporate property, except its franchises, unless expressly restrained therefrom by the provisions of the constating instruments.[2] The power either to sell or mortgage the franchises of the corporation is never, it has been held, to be implied, but must be conferred by some express provision.[3] The power to purchase lands has also been held to carry with it by implication the power to mortgage the same to secure the purchase money.[4]

SEC. 272. And, as a general rule, corporations may mortgage

[1] Alabama L. Ins. Co. v. Smith, 4. Ala (N. S.) 558. See, also, Attorney-Gen. v. Insurance Co., 9 Paige 470; Safford v. Wyckoff, 4 Hill, 442; Lexington v. Butler, 14 Wall. 282; Summer v. Marcy, 3 Woodb. & M. 105.

[2] Parish v. Wheeler, 22 N.Y. 494; Nelson v. Eaton, 26 id. 410; Curtis v. Leavitt, 15 id. 9; Barry v. Merchants' Ex. Co., 1 Sandf. Ch. 380; Farmers' Loan and Trust Co. v. Hendrickson, 25 Barb. 484; Holbrook v. Basset, 5 Bosw. 147; King v. Merchants' Ex. Co., 1 Seld. 547; Miller v. Chance, 3 Edw. 399; Pennock v. Coe, 23 How. 117; Richards v. Merrimack, etc., R. Co., 44 N. H. 127; Burr v. McDonald, 3 Gratt. 206; Susquehanna Bridge Co. v. General Ins. Co., 3 Md. 305; Bardstown, etc., R. Co. v. Metcalfe, 4 Metc. (Ky.) 199; Coe v. Johnson, 18 Ind. 218.

[3] Susquehanna Canal Co. v. Bonham, 9 W. & S. 27; Steiners' Appeal, 27 Pa. St. 313; Lauman v. Lebanon Valley, etc., R. Co., 30 Pa. St. 42; York & Md. R. Co. v. Winans, 17 How. 39; Pullan v. Cincinnati, etc., R. Co., 4 Biss. 35: Pierce v. Emery, 32 N. H. 484; Commonwealth v. Smith, 10 Allen, 448; Richardson v. Sibley, 11 id. 65; Hendee v. Pinkerton, 14 id. 381; Troy, etc., R. Co. v. Kerr, 17 Barb. 601; Black v. Delaware, etc., Canal Co., 7 C. E. Green. 99; Winchester, etc., Turnp. Co. v. Vimont, 5 B. Monr. 1; Arthur v. Commercial Bank, 9 S. & M. 394; Coe v. Columbus, etc., R. Co., 10 Ohio St. 372. See, however, Hall v. Sullivan, etc., R. Co., 2 Redf. Ano. R. Cas. 621; Shepley v. A. & St. L. R. Co., 55 Me. 395; Kennebec, etc., R. Co. v. Portland, etc., R. Co., 59 id. 9; Miller v. Rutland, etc., R. Co., 36 Vt. 452.

If the mortgage is of the franchises as well as the property, it will be void as to the former, but good as to the latter, unless otherwise provided by law. Pullman v. Cincinnati, etc., R. Co., 4 Biss. 35. But see, under Massachusetts statutes, Richardson v. Sibley, 11 Allen, 65.

As to the power under statutes of various states, to form new corporations by the purchasers on a foreclosure of mortgages against old ones, with all the powers of the old ones, but exempt from its debts and liabilities, see Wilcox's Ohio R. L. 209; 9 N. Y. R. S. (Edmonds') 616, 912; Nixon's N. J. Dig. (4th ed.) 791; Purdon's Penn. Dig. (9th ed.) 200; R. S. Wiscon., ch. 79, § 33; Virginia Code, ch. 61, § 27; Gen. Stat. Neb. (1873), 204; Swan & Sengluis' Ohio Stat. 125. See, also, Green's Brice's Ultra Vires, 123 *et seq.*

[4] Gordon v. Preston, 1 Watts, 385; Taber v. Cincinnati, etc., R Co., 15 Ind. 459; Jackson v. Brown, 5 Wend. 590.

And power expressly conferred to mortgage for some particular purpose will not, it has been held, prevent mortgaging the property to secure creditors. Allen v. Montgomery, etc., R. Co., 11 Ala. (N. S.) 437; Mobile, etc., R. Co. v. Talman, 15 id. 472. See, also, Phillips v. Winslow, 18 B. Monr. 431.

or assign their property to secure or pay their debts;[1] and such mortgage may not only create a lien on the existing property of the corporation, but by its terms be made to cover subsequently acquired property, which it may be necessary for it to acquire, in the prosecution of its legitimate business.[2] But frequently this right is expressly provided for by statutes.[3]

SEC. 273. **Conclusions as to ultra vires contracts.** — From the foregoing it will probably be apparent that a contract may be ultra vires:

1. When it is made by the corporation or its agents, but is beyond the power of such corporation.

2. When executed by an agent, but is not within the scope of the powers conferred upon him.

[1] Pierce *v.* Emerry, 32 N. H. 484; Commissioners, etc., *v.* Troy, etc., R. Co., 1 Redf. Am. R. Cas. 575; Commonwealth *v.* Smith, 10 Allen, 448; Shaw *v.* Norfolk, etc., R. Co., 5 Gray, 162; Lenox *v.* Roberts, 2 Wheat. 373; Dana *v.* Bank U. S., 5 W. & S. 223; State *v.* Bank of Md., 6 G. & J. 205; Hopkins *v.* Gallatin Turnp. Co., 4 Humph. 403; *Ex parte* Conway, 4 Ark. 304; Haxtun *v.* Bishop, 3 Wend. 13; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119; S. C., 3 Comst. 238; Flint *v.* Clinton Co., 12 N. H. 431; Warner *v.* Mower, 11 Vt. 385.

It is immaterial whether the instrument is a mortgage or trust deed. Whitewater & C. Co. *v.* Vallette, 21 How. 414; Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. 35; Coe *v.* McBrown, 22 Ind. 252; Coe *v.* Johnson, 18 id. 218. But see *In re* York, etc., R. Co., 50 Me. 552.

[2] Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. 254; Galveston etc., R. Co. *v.* Cowdrey, 11 id. 483; United States *v.* New Orleans, etc., R. Co., 12 id. 362; Railroad Co. *v.* Soutter, 13 id. 517; Pennock *v.* Coe, 23 How. 117; Williamson *v.* New Albany, etc., R. Co., 1 Biss. 198; Morrill *v.* Noyes, 56 Me. 458; Haven *v.* Emery, 33 N. H. 66; Seymour *v.* Canada, etc., R. Co., 25 Barb. 284; Stevens *v.* Buffalo, etc., R. Co., 31 id. 590; Buffalo, etc., R. Co. *v.* Lampson, 47 id. 533; Benjaman *v.* Elmira, etc., R. Co., 49 id. 446; Fish *v.* Potter, 2 Abb. Ct. App. Dec. (N. Y.) 138; Stevens *v.* Watson, 4 id. 302; Philadelphia, etc., R. Co. *v.* Woelpper, 64 Pa. St. 366; State *v.* Northern Cent. R. Co., 18 Md. 193; Ludlow *v.* Hunt, 1 Disb. 552; Coe *v.* McBrown, 22 Ind. 252; Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551. But compare Howe *v.* Freeman, 14 Allen, 566; Moody *v.* Wright, 13 Metc. 17; Coe *v.* Ct. Piqua R. Co., 10 Ohio St. 372; Brainerd *v.* Peck, 34 Vt. 496; Bath *v.* Miller, 53 Me. 368; Williamson *v.* New Jersey, etc., R. Co., 10 C. E. Green, 13; Pierce *v.* Emerry, 32 N. H. 484; Farmers', etc., Co. *v.* Commercial Bank, 11 Wis. 207; Jessup *v.* Trustees, 11 Ia. 572; Phillips *v.* Winslow, 18 B. Monr. 430.

[3] Iowa Code (1873), § 1284.

If a railroad has authority to borrow money and execute such securities as it may deem expedient, it may mortgage its road and franchises and all of its property of every kind, including future acquisitions and earnings. Pierce *v.* St. Paul, etc., R. Co., 24 Wis. 551.

And a mortgage given to the state, by virtue of a provision of the statutes, and expressed to be on "roads, lands and franchises," has been held on foreclosure and sale to convey all the franchises, including all right to exist as a corporation. Parcher, *v.* St. Paul R.Co., 14 Minn. 297; Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424; Parish *v.* Wheeler, 22 N. Y. 494.

3. When it is contrary to the positive provisions of law, or against public policy.

And it may be affirmed:

1. If a contract ultra vires is executed by a corporation, and by virtue thereof it receives the consideration and fruits of the same, and appropriates it; and especially if all the members receive the benefit of it and acquiesce therein, the plea of ultra vires cannot be maintained by such corporation as a defense to an action on the contract.

2. If an agent executes a contract ultra vires, but the corporation receives the benefit of the same, under the circumstances last above stated, the defense of ultra vires cannot be made to an action on such contract.

3. If a contract ultra vires is entered into by a corporation or its agents, but remains wholly unexecuted, any stockholder, or under certain circumstances, a creditor, may, by a proper proceeding, restrain the execution of the same.

4. If a contract is ultra vires because it is in violation of positive law, or against public policy, the execution of it could undoubtedly be restrained by a stockholder or other interested party.

5. If an ultra vires contract has been entered into by a corporation, that is, a contract that the corporation has no authority or right to make, and any one director or stockholder dissents therefrom or objects thereto, he may, especially if unexecuted, enjoin the execution of the same.

6. If the contract is ultra vires, it is held by some of the authorities that this may be set up as a defense to an action on the contract; but in such a case the other party to such contract, or his assigns may, in all cases, recover the consideration of the contract, viz.: the money advanced or the value of the property delivered thereon.

7. That in all cases where money or property has been received by a corporation, by virtue of a contract, and the act has received the universal assent, either express or implied, of the corporators, such contract will be binding, notwithstanding it may be ultra vires; and if a defense by the corporation of ultra vires, can be successfully interposed to a recovery on such contract, it cannot defeat the right of the other party to recover the amount of

money advanced or the value of property actually delivered by him, and received and appropriated by such corporation.

8. The better doctrine would seem to be that where a contract ultra vires, has been made by a corporation, and it has received the full consideration and appropriated the same, so that it cannot be restored and the other party placed in *statu quo*, and especially where no objection is interposed upon the part of those who might have made it, the corporation will generally be bound by the contract, the same as a natural person.

We shall hereafter consider the remedies at law and in equity of members and creditors, in cases of acts which are ultra vires.

CHAPTER X.

THE CORPORATE SEAL.

SEC. 276. **Definition; history.** — A seal has been defined as an impression upon wax, wafer, clay, or some other tenacious substance capable of being impressed.[1] Lord COKE defined it as wax with an impression; *sigillum est cera impressa, quia cera sine impressione non est sigillum.*[2] But the former practice of using wax or wafers has grown into disuse with corporations, as well as for private seals; and with the former, at least, an impression on parchment or paper is generally considered as sufficient and equivalent to an impression on wax or wafer.

SEC. 277. **History; private seals.** — The use of seals may be traced to a very remote antiquity, and private signets and rings

[1] 3 Inst. 169; Warren *v.* Lynch, 5 Johns. 239.

[2] 3 Inst. 169. See, also, 5 Johns. 239; 2 Caines, 362; Mill Dam Foundry *v.* Hovey, 21 Pick. 417; 4 Kent's Com. 452. But a distinct impression of the seal upon paper is generally held a sufficient seal, without wax or wafer. Carter *v.* Burley, 9 N. H. 558. See, also, Mill Dam Foundry *v.* Hovey, 21 Pick. 417; Hendee *v.* Pinkerton, 14 Allen, 381.

If the president of a corporation, which has adopted no corporate seal, executes a mortgage deed, and the trustees adopt a seal that he affixes opposite his name as the seal of the corporation for the time being, such seal is sufficient. South Baptist Soc. *v.* Clapp, 18 Barb. 36.

And a corporation may adopt the seal of another, or an ink impression as a seal. Crossman *v.* Hilltown, etc., Co., 3 Grant (Pa.), 225.

And in Vermont it has been held that a corporation might convey by the deed of their president, sealed with his private seal. Warner *v.* Mower, 11 Vt. 385.

were at an early period used for sealing in the place of signatures, and as insignia of authority. Thus, we find King Darius sealing "with his own signet and with the signet of his lords."[1] And Ahasuerus said to Esther, the queen, "write ye also for the Jews as it liketh you, in the king's name, and seal it with the king's ring; for the writing which is written in the king's name and sealed with the king's ring may no man reverse."[2]

It seems, also, that private seals were in common use among the Romans, and especially in attestation of testaments.[3]

In the times of the early English Saxons, it does not appear that seals were much in use in England. According to Blackstone, it was the practice of the illiterate to affix to instruments a cross instead of a signature; and the French Normans used only a seal. He says: "The method of the Saxons was for such as could write to subscribe their name, and whether they could write or not, to affix the sign of the cross, which custom our illiterate vulgar do, for the most part, to this day keep up, by signing their mark when unable to write their names. And, indeed, this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters. In like manner, and for the same unsurmountable reason, the Normans, a brave, but illiterate nation, at their first settlement of France, used the practice of sealing only without writing their names, which custom continued when learning made its way among them, though the reason for doing so ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter, of any authenticity, in England. At the conquest, the Norman lords brought over into this kingdom their own fashions, and introduced waxen seals only, instead of the English method of writing their names and signing with the sign of the cross. And in the reign of Edward I, every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their

[1] Bible, Daniel 6, v. 17. And it is recorded that Jezebel, wife of Ahab, king of Samaria, "wrote letters and sealed them with his seal." Bible, 1 Kings, ch. 21, v. 8. See, also, Genesis, ch. 38, v. 18; Jeremiah, ch. 22, v. 10, 11.

[2] Bible, Esther, ch. 8, v. 8. See, also, Jeremiah, ch. 32.

[3] 2 Bl. Com. 305; 4 Kent's Com. 453.

distinct particular seals. * * * This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held, in all our books, that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds, *sealed and delivered*, continues to this day."[1]

SEC. 278. **How seals came into use.** — From what has been said it is evident that private seals came into use from the inability of parties to write; and that the practice is continued both with natural persons as well as corporations, from a custom that would perhaps be "more honored in the breach, than the observance."

SEC. 279. **Incident of a corporation.** — A right to have and use a common seal is said to be incident to all corporations.[2] The use of the common or corporate seal by corporate bodies is supposed to have originated like private seals, from the general inability of persons to write,[3] although Sir Wm. Blackstone attributes the use of a common seal to the fact that "a corporation being an invisible body cannot manifest its intentions by any personal act or oral discourse, it therefore acts and speaks only by its common seal."[4]

This is not, however, literally correct, as the will of the corporate body can only be expressed by a vote or voice of the majority of its members;[5] and the common seal affixed to a corporate instrument is only authenticated evidence of such corporate will. If authority is, by the corporators or by the fundamental law of the corporation, conferred upon a certain number of its members, as a board of directors, they may undoubtedly represent the members and are supposed in their vote or acts to represent the body of the corporators. And the annexation of a common or corporate seal, to any corporate conveyance or contract, is evidence only that the majority of the corporators have assented to such conveyance or contract; and when it is used it is in attestation of this will, although Blackstone observes in reference to the

[1] 2 Bl. Com. 305.

[2] 1 Dill. on Mun. Corp., § 130; Bac. Abr., tit. Corp. 3.

[3] Ang. & Am. on Corp., § 216.

[4] 1 Bl. Com. 475.

[5] The ancient doctrine has been departed from, in the modern decisions. Chesapeake, etc., Co. v. Knapp, 9 Pet. 541; Fleckner v. Bank of United States, 8 Wheat. 338, where it was held that the acts of a corporation may be evidenced by a written vote as well as by the corporate seal.

corporate seal, that "it is the fixing of the seal, and that only which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."[1] But it is evident that this idea of the corporate seal is imaginary, and rests upon no real foundation. It is a mere sign of the corporate will — a mere evidence of corporate action; and in this respect possesses no higher qualities or virtue than the private seal of an individual.

The practice of using a corporate seal probably originated, as we have suggested, in an age of general ignorance of the art of writing; and like the private seal it has continued in use, although the original reason for its use has ceased to exist.

SEC. 280. **Former doctrine as to corporate seals.** — It was formerly held that the corporate assent, as we have stated, could only be expressed by the corporate seal. But there has been a great relaxation of this rule, if it is not entirely discarded.[2] And the general doctrine now recognized is, that the corporation may make contracts, by the will of the majority of the corporators, or, which is the same thing, by the action and will of the majority of those authorized to act for the body; the corporate seal being only essential, if at all, in case of the conveyance of lands, or the more important contracts.

It has been truly said that "as the art of writing became more common in England, the practice of concurring with the tenor of every written instrument by seal, on account of its inconvenience,

[1] 1 Bl. Com. 475.

[2] Henderson v. Australian Royal Mail, etc., Co., 5 E. & B. 409; Same v. Marzetti, 11 Exch. 228; Fishmongers' Co. v. Robertson, 5 M. & G. 131; Clark v. Cuckfield, 11 Eng. L. & E. 443; Copper Mines v. Fox, 16 Q. B. 229; Diggle v. London, etc., R. Co., 5 Exch. 442; Mayor of Ludow v. Charlton, 6 M. & W. 815; Arnold v. Mayor of Poole, 4 M. & G. 860; Paine v. Strand Union, 8 Q. B. 226; Church v. Imperial, etc., R. Co., 6 A. & E. 846; Smart v. West Ham. Union, 10 Exch. 867; Reuter v. Elec. Tel. Co., 6 E. & B. 341; 37 E. L. & E. 189; Lowe v. London, etc., R. Co., 18 Q. B. 632.

The former doctrine seems to be entirely discarded in this country. Bank of Columbia v. Patterson, 7 Cranch, 299; Chestnut Hill Turnp. Co. v. Rutter, 4 S & R. 16; School District v. Wood, 13 Mass. 199; Bank of U. S. v. Dandridge, 12 Wheat. 64; Bank of Columbia v. Patterson, 7 Cranch, 299; Mott v. Hicks, 1 Cow. 513; Union Bank v. Ridgely, 1 Har. & G. 324; The Banks v. Poitiaux, 3 Rand. (Va.) 136; Fleckner v. Bank of U. S., 8 Wheat. 338; Danforth v. Schoharie Turnp. Co., 12 Johns. 227.

If the common seal is affixed to an instrument, and the signatures of the proper officers, the courts will presume that they did not exceed their authority. Morris v. Keil, 20 Minn. 531.

grew into disuse with individuals, and was confined to those writings of a peculiarly high and solemn kind, which were employed in the transfer of lands and acts of the like nature. The practice, however, still continued with the old corporations of the common law, perhaps from the natural inflexibility of bodies of men, where many wills must concur to a change, and because owing to the comparative paucity of their contracts, and the number of their agents, the inconvenience of this mode of contracting would be less sensibly felt by them than by individuals. It is probable that in this way grew up the old rule, so long and so well established in England, that except in the administration of its internal affairs, as the election of officers and the like, corporations aggregate could signify their assent only by their common seal, and of course could act and contract only by deed."[1]

[1] Ang. & Am. on Corp., § 216.

An interesting article on the subject of seals may be found in the American Law Rev., Vol. 1, p. 638. The author among other things refers to the antiquity of seals and observes

"It seems to us, moreover, that a philological and historical examination of the question leads to the gratifying conclusion, that the common law, in this as in other matters, did not 'stick in the bark' or wax, but recognized a substantial and intelligible principle and distinction; viz., that the distinctive element of sealing is the solemn and formal authentication of an instrument by the impression of some permanent symbol or token besides the signature, and has never selected or prescribed any single material on which that symbol must be impressed.

It may not be uninteresting, without attempting to pursue the subject through all history, to recur to some of the most ancient illustrations of a similar custom. Lord COKE and the writers of his age would hardly have rejected the authority of Job (xxxviii. 14), where we find the words, 'It is turned as clay to the seal.'

Impressions of seals upon clay have been discovered, which are thought to be of great antiquity. (Smith's Dict. of the Bible, verb. Clay and Seal.) Mr. Layard, in his 'Discoveries in the Ruins of Nineveh and Babylon' (Part I), refers to such instances.

'Other corroborative evidence,' he says (p. 153), 'as to the identity of the king who built the palace of Kouyunjik with Sennacherib, is scarcely less remarkable. In a chamber or passage in the south-west corner of this edifice were found a large number of pieces of fine clay, bearing the impressions of seals, (resembling the γῆ σημαντρίς [the sealing earth] of the Greeks, which there is no doubt had been affixed, like modern official seals of wax, to documents written on leather, papyrus, or parchment. Such documents, with seals in clay still attached, have been discovered in Egypt, and specimens are preserved in the British Museum. The writings themselves had been consumed by the fire which destroyed the building, or had perished from decay. In the stamped clay, however, may still be seen the holes for the string, or strips of skin, by which the seal was fastened: in some instances, the ashes of the string itself remain (M. Botta also found at Khorsabad the ashes of string in lumps of clay impressed with a seal, without being aware of their origin), with the marks of the fingers and thumb.'

And again (p. 156 n.): 'Not to instance the clay seals found attached

SEC. 281. **Origin of the law relating to corporate seals.**—We have referred to the origin of the use of private as well as corporate seals, and the doctrine of the common law that the corporate body could only act or express its action or assent by its common seal. The early English doctrine on this subject was peculiar to the common law, and not borrowed from the civil law, from whence came most of the principles and doctrines, relating to corporations. For, according to Ayliffe, corporations might contract directly by vote

to the rolls of papyrus, containing letters written in the time of the Ptolemies and Romans, there are in the British Museum seals bearing the name of Shashank or Shishak (No. 5585), of Amasis II, of the twenty-sixth dynasty (No. 5584), and of Nafuarut or Nepherophis, of the twenty-ninth dynasty (No. 5585). Such seals were therefore affixed by the Egyptians to public documents; and it was in accordance with this principle, common to the two monarchies, that the seal of the Egyptian king has been found in Assyria.'

So (p. 159), 'It would seem, that, a peace having been concluded between the Egyptians and one of the Assyrian monarchs, probably Sennacherib, the royal signets of the two kings, thus found together, were attached to the treaty, which was deposited amongst the archives of the kingdom. Whilst the document itself, written upon parchment or papyrus, has completely perished, this singular proof of the alliance, if not actual meeting, of the two monarchs, is still preserved amidst the remains of the state papers of the Assyrian Empire.'

The reader who has seen an English patent, with its pendent seal, or the cumbrous attachments of treaties, will be struck with this evidence of the antiquity of the custom thus preserved; and the citations which follow furnish evidence of its connection, by a chain of legal and political usage, with the present time.

Sigillum is the original word now translated into seal, and the word used by ancient writers, among them Lord COKE, whose authority is often cited and relied upon in reference to this point.

Sigillum, *signum*, and *signaculum* mean a mark, figure, or impression, on whatever material or substance. Leverett's Latin Lexicon defines *sigillum*, the diminutive of *signum*, as 'a little image or figure,' while *signum* is said to mean 'a mark or sign,' and as a derivative or secondary meaning, 'the impression of a seal, seal.' And, in the large Lexicon Totius Latinitatis of Facciolatus and Forcellinus, the following definition is given: 'De imagine, quæ annulo signatorio in cera *aliave materia* imprimitur, obsignandis litteris, amphoris, scriniis,' etc.

It does not seem necessary to inquire when traces of a custom of such early origin can first be found in the Middle Ages. The pendent seals already mentioned were then used; and in the Glossary of Du Cange (Didot's ed. 1846, with additions by different hands, here referred to without distinction), we find it stated in reference to these: 'Pensilium sigillorum, non nuperum sed perantiquum usum fuisse, licet colligere et iis quæ de *Bullis* observavimus, ubi *plumbeas et aureas* Bullas primitus, filo aut serico tabulis appensas, docuimus.' 'Sed,' it is added, 'quando *cerea* istiusmodi sigilla perinde literis appendi cœperint non plane constat.' 'Dubius hæret ipsemet Cangius.' In one place he speaks of the twelfth century: in another he says they were used in France about the ninth or tenth; while it is stated that the use of seals of any kind was entirely unknown in England in the beginning of the eleventh century. (verb. *Sigillum*, p. 241).

On the continent, gold, silver, and lead were used. Sometimes lead was used '*loco ceræ*,' or with wax, and wax with gold, 'ut si aureum subriperetur remaneret alterum.'"

(Du Cange, Cowel, } verb. *Bulla*, *Sigillum*.
Tomlin's Jacob's, verb. Bull and Seal.)

without the intervention of officers or agents, and of course without the use of a seal.[1]

In relation to seals, it may with propriety be observed, that their use having originated in the ignorance of people of the art of writing, and this reason for the use of them having now been generally removed by the general intelligence and ability of people to write, there would seem to be no good reason for a continuance of it, either as a private or corporate practice. And, accordingly, we find it rapidly going into disuse; and much of the former technical doctrines relating to seals and sealed instruments practically disregarded, or at least greatly changed. And although Blackstone affirmed that: "a corporation being an invisible body cannot manifest its intentions by any personal act or oral discourse, it, therefore, acts and speaks only by its common seal. For although the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the assents of the individuals who compose the community, and makes one joint assent of the whole,"[2] it is evident that the corporate seal did not unite, in fact, the wills of the many members of a corporation aggregate, but that that will at all times could only be expressed by the vote cast by its members, or a majority of them; and the common seal only furnished evidence of that will, as thus expressed.

The seal did not make "one joint assent of the whole," but was high, if not conclusive, evidence, of the corporate assent. And it was never true that this assent could only be shown by the common seal. The records of corporate action were always evidence, to show that by the votes of its members by-laws had been adopted, certain officers elected, and agents appointed for general or special purposes. And the agents thus appointed can bind the corporation to any contract within the scope of the authority thus conferred upon them by a mere corporate vote, without the use of the common seal, and without any authority conferred by a common seal. But where, by law, a valid contract

[1] Ayliffe's Civ. Law, B. 2, tit. 35, p. 198. See, also, 2 Bl. Com. 305; 2 Wood's Civ. L. 136; Browne's Civ. Law, B. 1, 104.

[2] 1 Bl. Com. 475.

can only be executed by a seal of the parties, the seal of the corporation may be required to constitute a valid contract.[1]

SEC. 282. Instead of affirming that "a corporation being an invisible body cannot manifest its intentions by any personal act or oral discourse," and that "it therefore acts and speaks only by its common seal," it seems to me it would be more correct to say, that as it is a mere ideal body, composed of members, a majority of whose wills constitute the will of the corporate person, this corporate will can only be evidenced by a fair expression of the wills of this majority, of which the records of the corporation in this respect are the best evidence, and that the signatures of officers or agents properly made, and the annexation of the corporate seal, is but evidence and authentication of the corporate will and action, expressed in some manner at a meeting of its members.[2]

"The truth is, that though in its decay, the Roman empire was won back to ignorance by barbarous invaders;[3] in its better days, neither individuals nor corporations existing within it were in general compelled to use seals by way of signature from an ignorance of the art of writing. A common seal was not, therefore, necessary to a corporation at the civil law to enable it to make a written contract, and accordingly Wood tells us of such a corporation, that 'it may have a common chest, and sometimes a common seal.'"[4]

SEC. 283. **Corporate seal; present doctrine in reference to.** — It was essential at common law, as we have seen, that the seal not only of private persons, but of corporations, should be impressed upon wax, wafer or other impressible and tenacious substance; but

[1] Angel & Ames, in their work on Corporations, observe: "The civil law, in the shape in which we have it, was instituted amongst a people more literate than that which gave origin to the common law. From the nature of the corporations and communities existing under it, the same incapability, literally speaking, of personal act or of oral discourse, was attached to them as to corporations aggregate at the common law; yet, we find that not only did they appoint officers, capable of contracting without seal, but themselves contracted directly by vote, without the intervention of any officers whatever." Aylifie's Civ. L., B. 2, tit. 35, p. 118.

[2] See 1 Redf. on Rail., § 143.

[3] Wood. Civ. L., c. 2, p. 136; Browne's Civ. L. b. 1, 104.

[4] Wood's Civ. L., c. 2. p. 136; Browne's Civ. L., B. 1, 104. See, also, Ang. & Am. on Corp., § 216.

this doctrine has been in modern times much relaxed. For instance, it has been recently held that it was sufficient to impress either private or corporate seals directly upon the paper or parchment upon which the instrument is written, and this mode of impressing seals has in some of the states been authorized by statutory provisions.[1] And, on general principles, any mode of impression which would answer for private seals, in the absence of other statutory regulations, would be good in case of corporate seals.

The early doctrine required all important contracts and the appointment of agents of the corporation to be made in writing under the corporate seal.[2] But the tendency of the decisions of our courts is to allow the same latitude in this respect as with respect to the seals of private persons, and in all the more common transactions of the corporation it may act and contract by the will of the body, as expressed by a vote of the majority or by a majority of those that represent the body, as by the directors, and that the corporate will as thus expressed may be executed by the proper agents of the corporation, even without an appointment under the common seal. And it is now well settled, that acts of a corporation evidenced by a vote are as binding upon it and are as complete authority to its agents in the execution of the will of the corporation, thus expressed, as if such will and authority was authenticated by the corporate seal; that it may be as well bound by the acts of its agents thus authorized as by the corporate seal, and that promises may as well be implied from its acts and the lawful acts of its agents as if the principal was a natural person.[3]

[1] Corregan *v.* Taunton, etc., Co., 1 Halst. 52; 4 Kent's Com. 445; 1 Dill. on Mun. Corp., § 130; Ang. & Am. on Corp., § 218; Woodman *v.* York, etc., R. Co., 50 Me. 549; Haven *v.* Grand Junction R. Co., 12 Allen, 337. See, also, argument in this case, 1 Am. L. Rev. 638; Hendee *v.* Pinkerton, 14 Allen, 381, Royal Bank of Liverpool *v.* Grand Junction R., 100 Mass. 444; *In re* Sandilands, L. R., 6 C. P. 411.

[2] Aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore, gifts by them must be by deed. 2 Bac. Abr., Ann. Ed., tit. Corp. E. 3, p. 452. So it was formerly held that such a corporation could not, without a deed, command bailiff to enter into lands of a lessee for years, for a condition broken. 1 Roll. Abr. 514–699; Cro. Eliz. 815; Cro. Jac. 411.

Neither could they without a deed properly sealed with the corporate seal appoint one to seize goods as forfeited to the use of the corporation. 2 Bac. Abr. (Am. Ed.) 453. See, also, 2 Bac. Abr. (Am. Ed.), tit. Corp. E. 3, p. 453.

[3] Board of Education *v.* Greenebaum, 39 Ill. 609; Ross *v.* Madison, 1 Ind. 281; Merrick *v.* Burlington, 11 Ia. 74; Petrie *v.* Wright, 14 Miss. 647; Buckley *v.* Briggs, 30 Mo. 452.

And the corporate will is now seldom expressed or authenticated by the corporate seal, except in those cases where, under similar circumstances, it would be necessary to execute the instrument with a seal if a natural person was the party executing it.[1]

SEC. 284. Wherever the law requires a natural person to attach a seal to the instrument executed by him, in like cases only, would it be necessary for a corporation to execute a like instrument by a corporate seal. If in the former case the instrument

[1] Kyd on Corp. 263; Harper *v.* Charlesworth, 4 B. & C. 575; Union Bank *v.* Ridgely, 1 H. & G. 419; Bank of U. S. *v.* Dandridge, 12 Wheat. 105; Wood *v.* Tate, 5 B. & P. 247; Dillon on Mun. Corp., § 132.

Mr. Kent observes: "It was the ancient and technical rule of the common law, that a corporation could not manifest its intentions by any personal act or discourse, and that it spoke and acted only by its common seal. Afterward the rule was relaxed, and, for the sake of convenience, corporations were permitted to act, in ordinary matters, without deed, as to retain a cook, or a servant, or butler. * * * In Rex *v.* Bibb (P. Wms. 419), the old rule was further relaxed, and it seems to have been established, that though a corporation could not contract directly except under their corporate seal, yet they might by mere vote or corporate act, not under their corporate seal, appoint an agent whose acts and contracts, within the limits of his authority, would be binding on the corporation. In a case as late as 1783, it was held, that the agreement of the major part of a corporation, entered in the corporation books, though not under the corporate seal, should be decreed in equity. (Maxwell *v.* Dulwich College, 1 Fonb. Tr. 296 note). [But see, in Carter *v.* Dean of Ely, 7 Simons, 211, where it was held that the agreement of the major part of a corporation, entered in the corporation books, though not under the corporate seal, would be decreed in equity.] In Yarborough *v.* The Bank of England (16 East, 6), it was admitted that the corporation might be bound by the acts of their servants, though not authorized under their seal, if done within the scope of their employment. At last, after a full review of all the authorities, the old technical rule was condemned in this country, as impolitic and essentially discarded, for it was decided by the supreme court of the United States, in the case of The Bank of Columbia *v.* Patterson (7 Cranch, 299), that, whenever a corporation aggregate was acting within the range of the legitimate purposes of its institution, all parol contracts, made by its authorized agents were express and binding promises of the corporation, and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises for the enforcement, of which an action lay." 2 Kent's Com. 288.

Mr. Kent further observes: "The adjudged cases in England and in Massachusetts were considered as fully supporting this reasonable doctrine, and that the technical rule that a corporation could not make a promise except under seal would be productive of great mischief. As soon as it was established that the regularly appointed agent of the corporation could contract in their name without seal, it was impossible to support the other position." 2 Kent's Com. 288 *et seq.*

Mr. Redfield says: "No particular form of contract is requisite to bind the company, unless where the charter expressly requires it. And although there seems to be a failing effort in the English courts to maintain the necessity of the contracts of corporations being under seal, it is certain that the important business transactions of daily occurrence, in both that country and here, where no such formality is resorted to by business corporations, in matters of contract, and where to look for any such solemnity would be little less than absurd, almost of necessity drive the courts of England to disregard the old rule of requiring the contracts of corporations to be made under the corporate seal." 1 Redf. on Railw. 409.

must be by deed, that is, executed or authenticated by a seal, so, in the latter case, should it also be executed or authenticated by the common seal of the corporation.

SEC. 285. The execution of the corporate deed must, of course, be by an agent. The corporation being but an incorporeal or ideal person, it could not be supposed capable, as such, of performing a physical act, but must in such matters act by its duly constituted agents in the corporate name, and, when so required, must authenticate the same by the common seal, the usual form of authentication being, "In testimony whereof the common seal of the corporation is hereby affixed," the name of the corporation being signed by the agent, with his name as such agent, and the common seal of the corporation attached or affixed thereto.

The common seal of a corporation affixed to an instrument purporting to be executed by the proper agent, makes it a specialty where such an instrument is required, and has the same effect as if executed in a like case by a natural person.[1]

In the case of *The City of Davenport* v. *The Peoria Marine and Fire Insurance Company*, the supreme court of Iowa, by COLE, J., say: "The English rule that a corporation cannot expressly bind itself except by deed, unless the act establishing it authorizes it to contract in another mode, has been broken in upon, and indeed entirely overturned, as a general proposition, throughout the United States; and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied from the acts of its agents, as if it had been an individual."[2]

[1] Clark v. Farmers', etc., Co., 15 Wend. 256; Steele v. Oswego, id. 265; Benoist v. Carondelet, 8 Mo. 250; Sturtevants v. Alton, 3 McLean, 390; Dill. on Mun. Corp., § 132.

[2] 17 Ia. 276. See, also, Bank of Columbia v. Patterson's Administrators, 7 Cranch, 305; Fleckner v. The United States Bank, 8 Wheat. 357; The Bank of the United States v. Dandridge, 12 id. 68; Dunn v. The Rector of St. Andrews' Church, 14 Johns. 118; The American Insurance Co. v. Oakley, 9 Paige, 496; Overseers, etc., v. Overseer, 3 S. & R. 117; Hamilton v. Lycoming Ins. Co., 5 Barr. 344; Legrand v. Hampden Sidney College, 5 Munf. 324; Union Bank v. Ridgely, 1 H. & G. 413; Hayden v. Middlesex Turnpike Corp., 10 Mass. 401; White v. The Westport Cotton Man. Co., 1 Pick. 215; Bulkley v. The Derby Fishing Co., 2 Conn. 256; Garvey v. Colcock, 1 N. & McC. 231; Petrie v. Weight, 6 S. & M. 647; Baptist

And in England it has also been recently held that contracts executed in pursuance of an oral agreement by a party with a corporation, to do work or furnish supplies that are required in the accomplishment of the purposes and objects of the corporation, the party thus performing will be entitled to recover therefor, either upon the common counts or the special contract. WIGHTMAN, J., observed: "I am disposed to think that wherever the purposes for which a corporation is created render it necessary that the work should be done, or goods supplied to carry such purposes into effect, as in case of the guardians of a poor-law union, and orders are given at a board regularly constituted, and having general authority to make contracts for works or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay, on the ground that though the members of the corporation who ordered the goods or the work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting, and then say: no action lies; we are not competent to make a parol contract, and we avail ourselves of our disability."[1] But in England it has also been held that where work was done or materials furnished by virtue of a contract not under seal, which were not necessary nor incidental to the purposes for which the corporation was created, no recovery thereon could be had.[2]

SEC. 286. **What is a common seal.** — The common seal of a corporation is the instrument or stamp adopted by it for the purpose of stamping or making an impression upon wax or wafer, or other

Church v. Mulford, 3 Halst. 182; Abbott v. Hermon, 7 Greenl. 118; Walker v Bank of Kentucky, 3 J. J. Marsh. 201; Lee v. The Trustees, etc., 7 Dana, 28; Eastman v. Coos Bank, 1 N. H. 26; Sheldon v. Fairfax, 21 Vt. 102; Palmer v. Medina Ins. Co., 20 Ohio, 537.

[1] Clark v. Cuckfield Union, 21 L. J., Q. B., 349. See, also, Sanders v. Guardians of St. Neat's Union, 8 Q. B. 810, which was an oral order for iron; De Grave v. Mayor, etc., 4 C. P. 111, which was for weights and measures sent at the request of the defendant, and accepted by them; Beverly v. Lincoln, etc., Co., 6 A. & E. 829, which was an action for gas metres supplied to the defendants; Nicholson v. Bradford Union, L. R., 1 Q. B. 620, which was an action for coals supplied by a contract not under seal.

[2] See Paine v. Guardians', etc., Union, 8 Q. B. 326; 15 L. J., M. C., 89; Lamprell v. Bellericay Union, 3 Ex. 283; 18 L. J. Ex. 282; Homersham v. Wolverhampton, etc., Co., 6 Ex. 137; 20 L. J. Ex. 193.

impressible substance annexed to instruments made by it, or upon the paper or parchment upon which such instruments are written. The impression thus made is also, in one sense, the corporate seal.

Like a private seal, it was formerly required that the impression be made upon wax, wafer, or other impressible and tenacious substance attached to the paper or parchment upon which the instrument was written.[1] But according to the current of modern authorities, even in the absence of statutory regulations, the impression of the seal, when required at all, may be made directly upon the paper or parchment.[2]

SEC. 287. It is evident that the seal, either private or corporate, has ceased to serve its original purpose as a substitute for a signature, and as an authentication of a corporate or other instrument it possesses but little intrinsic value. The form of the instrument with which the impression is made, or the engraving or device on the seal if any, would seem to be immaterial. In fact, where a seal is required, any thing which may be accepted or adopted by a corporation with which to impress wax, wafer, or even the paper itself, would seem to be sufficient.

Where a seal or some impression is required on wax, wafer, or paper, it would appear quite immaterial as to the instrument used to make the impression, provided it is something adopted by the corporation or by the authorized agent, and is placed upon the instrument by the proper agent, or even by his direction or authority. Thus, it has been held that the corporate seal might be stamped or printed by the printer of the blank instruments of a corporation if done by the direction of the proper officers, and that the seal thus made and placed upon the paper on which an instrument was executed would be valid as a corporate seal.[3]

[1] Bank of Rochester v. Gray, 2 Hill, 228; Farmers' Bank v. Haight, 3 id. 492; Ang. & Am. on Corp., § 218.

[2] Hendee v. Pinkerton, 14 Allen, 381; Dill. on Mun. Corp., § 130; Corrigan v. Trenton, etc., Co., 1 Halst. 52; Reg. v. St. Paul, etc., 7 Q. B. 231; Davidson v. Cooper, 11 M. & W. 778; S. C., 13 id. 342.

[3] Royal Bank, etc., v. Junction, etc., R. Co., 100 Mass. 444; Woodman v. York, etc., R. Co., 50 Me. 549; Hindee v. Pinkerton, 14 Allen, 381.

It may be done with some permanent instrument prepared for that purpose, or it may be done by some temporary one, authorized or adopted by the corporation. Bank, etc., v. Rail-

On this question the supreme court of Massachusetts say: "The corporate seal having been affixed by the printer by direction of the officers of the corporation, and they having adopted his act and subsequently signed and issued the bond, the sealing was duly made, and the instruments became obligatory upon the corporation. This is no more nor less than constantly takes place when a scrivener prepares and affixes a seal to a deed, which the grantor thereupon signs and delivers. The practice is of unquestionable validity, and the authorities for it are abundant. If a stranger seal an instrument by the allowance or commandment, precedent, or agreement subsequent, of the person who is to seal it, that is sufficient."[1]

But the usual instrument with which the impression is made is one prepared expressly for the purpose, and on which is engraved the name of the corporation with the words "corporate seal," or "seal." And it has been held that an instrument executed by the proper agent or officer of the corporation and sealed, though by the impression of the common desk seal of a merchant, it will be presumed to be the seal of the corporation until rebutted by competent evidence.[2]

road Co., 30 Vt. 159; Tenney v. Lumber Co., 43 N. H. 343; Mill Dam Foundry v. Hovey, 21 Pick. 417; Porter v. Railroad, 37 Me. 349.

[1] Royal Bank, etc. v. Grand Junction, etc., R. Co., 100 Mass. 444; Bates v. Boston, etc., R. Co., 10 Allen, 251.

It is not necessary for an agent in executing a deed in behalf of a corporation, to use the corporate seal. Porter v. Androscoggin, etc., R. Co., 37 Me. 349. See, also, Clark v. Pratt, 47 Me. 55; Reynolds v. Glasgow Academy, 6 Dana, 37.

It has been observed: "At common law, the corporate seal cannot be impressed directly upon the paper, but must be upon wax or wafer, or some other tenacious substance, or the instrument to which it is attached will not operate as a sealed instrument.

In a recent case in New Jersey, however, a distinctive impression of the paper without the intervention of wax or wafer was held to be a lawful corporate seal. In the southern and Western parts of the United States, from New Jersey, inclusive, a flourish of the pen at the end of a name or a circle of ink or scroll has been allowed to be a valid substitute for a seal; and in the states of Delaware, Illinois, Missouri and Tennessee this substitute has, we believe, been introduced by acts of their legislatures. Though we know of no decision upon the subject, yet we see no reason, unless the act of incorporation expressly provides what the common seal shall be, why the substitute allowed for the private seals of an individual should not be allowed for the seal of a corporation." Ang. & Am. on Corp., § 218.

For an interesting article on this subject, see 1 Am. Law Rev. 649.

[2] Moises v. Thornton, 8 T. R. 303; Peake's Law of Ev. 48; Jackson v. Pratt, 10 Johns. 381; Mann v. Pentz, 3 Sandf. Ch. 271; Foster v. Shaw, 7 S. & R. 156; Den v. Vreelandt, 2 Halst. 352;

SEC. 288. **By whom the seal should be affixed.** — As all physical acts of corporations must be done by agents duly appointed for that purpose, it follows that the corporate seal must be affixed by an agent duly authorized for that purpose. Such agent may be designated in the law creating or constituting the corporation; but it is usually annexed by an officer, duly authorized by the by-laws, or by the president, by virtue of the implied authority conferred upon him as such officer.

But it is evident that the majority of the members of a corporation might direct and authorize any person to not only execute an instrument for the corporation, but to affix the corporate seal; and this authority could be conferred by them or by the fundamental law, as by the statute of its creation, or by the articles of association constituting the association, upon a limited number of the corporators as a board of directors, who, in that case, could duly authorize and appoint some officer or agent to execute a contract on behalf of the corporation, and affix the common seal thereto.[1]

The seal of a corporation affixed to an instrument, like the seal of a natural person, makes it a specialty.[2]

Darnell *v.* Dickens, 4 Yerg. 7; City Council, etc., *v.* Moorehead, 2 Rich. 450. See, also, Bank of Middlebury *v.* Rutland R. Co., 30 Vt. 159.

To an indenture between a corporation and an individual the parties "set their hands," but there was no reference to a seal. To the instrument, however, were attached seals consisting of small bits of paper fastened with wafers without any impression. Held to be sufficient. Mill Dam Foundry *v.* Hovey, 21 Pick. 417.

[1] Jackson *v.* Campbell, 5 Wend. 572; Damon *v.* Granby, 2 Pick. 345; Derby Canal Co. *v.* Wilmot, 9 East, 360; Bank of the U. S. *v.* Dandridge, 12 Wheat. 68, 113; The President, etc. *v.* Myers, 6 S. & R. 12; Clarke *v.* The Imperial Gas Co., 4 B. & A. 315; 1 N. & M. 206; Leggett *v.* New Jersey Banking Co., Saxton's Ch. (N. J.) 541; Clark *v.* Woollen Manuf. Co., 15 Wend. 256. See, also, Bank of Ireland *v* Evans, 5 H. of L. Cas. 389; 32 Eng. L. & Eq. 23.

[2] See *ante*, § 285. Also, see, Clark *v.* The Woollen Manuf. Co., 15 Wend. 256; Benoist *v.* Carondelet, 8 Mo. 250; The City of Davenport *v.* The Peoria, etc., Ins. Co., 17 Ia 276; Ring *v.* Johnson Co., 6 id. 265; Dill. on Mun. Corp., § 132.

A vote authorizing a committee to sell lands empowers them to make the necessary deeds in the name of the corporation, and if the committee consists of several, who all sign their names, only one seal is necessary. Decker *v.* Freeman, 3 Greenl. (Me.) 338. See, also, Burrill *v.* Nahant Bank, 2 Metc. 167.

The corporate seal affixed to an instrument does not render it a corporate act, unless it is affixed by a duly authorized officer or other agent. Jackson *v.* Campbell, 5 Wend. 572.

But the seal is *prima facie* evidence that it was so affixed. Lovett *v.* Steam Saw Mill Association, 6 Paige's Ch. 54.

SEC. 289. **Where an acknowledgment is required.** — It is generally necessary, not only to have certain instruments, especially deeds and other writings relating to lands, executed by a corporation through its duly constituted agent, and the corporate seal annexed or impressed upon the parchment or paper upon which the instrument or conveyance is written, but for the purposes of recording to have the same acknowledged before a proper officer. Where this is required, the proper officer or agent executing the instrument may, generally, make the acknowledgment required by the recording laws.[1]

SEC. 290. **Doctrine in relation to agents.** — We have considered the subject of corporate agents, generally; but in this connection we will observe that the recognized principle that the agent of a natural person, in order to bind his principal by deed, must have an authority so to do by deed, that is, by an instrument duly executed under seal, has no application to the agents of corporations.[2]

"The technical doctrine that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agents could not contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that whenever the corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action will lie."[3]

[1] Gordon *v.* Preston, 1 Watts (Pa.), 385; Lovett *v.* The Steam Saw Mill Association, 6 Paige's Ch. 60.

[2] Hopkins *v.* Gallatin Turnp. Co., 4 Humph. 403; Beckwith *v.* Windsor Manuf. Co., 14 Conn. 594; Howe *v.* Keeler, 27 Conn. 538; Burr *v.* McDonald, 3 Gratt. 215; Redf. on Rail., §§ 118, 143; Dill. on Mun. Corp., § 130.

[3] Bank of Columbia *v.* Patterson, 7 Cranch, 299. See, also, Gray *v.* Portland Bank, 3 Mass. 364; Gilmore *v.* Pope, 5 id. 491; Bank of Metropolis *v.* Guttschlick, 14 Pet. 19.

And in the case of *The United States Bank* v. *Dandridge*,[1] Mr. Justice STORY, in delivering the majority opinion of the supreme court of the United States, observes: "In ancient times, it was held that corporations aggregate could do nothing but by deed under their common seal. But this principle must always have been understood with many qualifications, and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby as their permanent official agent. Be this as it may, the rule has been broken in upon in a vast variety of cases in modern times, and cannot now as a general proposition be supported. And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of a corporate vote unaccompanied with the corporate seal."[2]

[1] 12 Wheat. 64.

[2] But in this case, MARSHALL, in his dissenting opinion, says: "Can such a being speak or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will. The voice which utters it is the aggregate voice. Human organs belong only to individuals. The words they utter are the words of individuals. These individuals must speak collectively to speak corporately, and must use a collective voice. They have no collective voice and must communicate this collective will in some other mode. That other mode, as it seems to me, must be in writing. A corporation will generally act by its agents, but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing. If, then, corporations were novelties, and all were required to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that when other means were not provided by statute, such will must be expressed in writing. * * * According to the decisions of the courts of England, as well as of this court, a corporation, unless it be in matters to which the maxim *de minimis non curat lex* applies, can act or speak, and of course contract, only by writing. This principle, which seems to be an essential ingredient of its very being, has been maintained by all the judges who have ever discussed the subject. Upon this principle, and the authority of these cases, I have supposed that a corporation cannot assent to a deed of any description unless this assent be expressed regularly in writing. It ought to be entered on the books of the corporation."

In Mayor of Ludlow *v.* Charlton, 6 M. & W. 815, ROLF, B., says: "The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in creating a body

SEC. 291. Whatever may have been the doctrine of the common law, it is now evident that the acts of the directors of a corporate body, evidenced by a recorded vote, are as binding upon the corporation, and as complete authority to agents, as if such will was expressed in writing, authenticated by the common seal.[1]

And a valid appointment of an agent for any purpose may be made without annexing to the authority or power of attorney a common seal.[2]

And the corporate will evinced by a vote recorded or unrecorded is, generally, as completely binding upon it, and confers as com-

corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding of the corporate seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done by the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity of a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent to the very nature of a corporation." See, also, Kidderminster *v.* Hardwick, L. R., 9 Exch. 24.

[1] Bank of U. S. *v.* Dandridge, 12 Wheat. 64.

The weight of authority in this country seems to be in favor of the position that private corporations, or the boards of directors as agents for, and lawfully representing them, and through which the business of the corporation is transacted, may appoint an agent for the conveyance of even real estate by vote, without an instrument under the corporate seal. And that if the formality of a sealed instrument was required, it would not affect the authenticity of the conveyance, if the individual who acts as agent and affixes the seal, derives his authority from a mere vote of the corporation. Dispatch Line, etc. *v.* Bellamy Man. Co., 12 N. H. 205.

[2] Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Owings *v.* Speed, id. 420; Osborn *v.* Bank of U. S., 9 id. 738; Bank of Columbia *v.* Patterson, 7 Cranch, 299; Warren *v.* Ocean Ins. Co., 16 Me. 439; Methodist Chapel *v.* Herrick, 25 id. 354; Badger *v.* Bank of Cumberland, 26 id. 428; Trundy *v.* Farra, 32 id. 225; Haven *v.* New Hampshire Asylum, 13 N. H. 532; Goodwin *v.* Union Screw Co., 34 id. 378; Andover Turnpike Co. *v.* Hay, 7 Mass. 102; Thayer *v.* Middlesex Ins. Co., 10 Pick. 326; Topping *v.* Bickford, 4 Allen, 120; Stamford *v.* Benedict, 15 Conn. 445; Dunn *v.* St. Andrew's Church, 14 Johns. 118; Powell *v.* Newburgh, 19 id. 284; Randall *v.* Van Vechten, id. 60; Clark *v.* Benton Manuf. Co., 15 Wend. 256; Baptist Church *v.* Mulford, 3 Halst. 182; Wolf *v.* Goddard, 9 Watts, 544; Elysville Manuf. Co. *v.* Okiso Co., 1 Md. Ch. 392; Union Bank, etc., *v.* Ridgely, 1 H. & G. 424; Kennedy *v.* Baltimore Ins. Co., 3 H. & J. 367; Northern Central R. Co. *v.* Bastian, 15 Md. 494; Bates *v.* Bank, etc., 2 Ala. 461; St. Andrew's Bay Land Co. *v.* Mitchell, 4 Fla. 192; Lathrop *v.* Com. Bank, 8 Dana, 114; Richardson *v.* St. Johns Ins. Co. 5 Blackf. 146; Legrand *v.* Hampden Sidney Coll., 5 Munf. 324; Garrison *v.* Coombs, 7 J. J. Marsh. 85; City of Detroit *v.* Jackson, 1 Doug. 106.

plete authority upon its agents as if authority was given under its corporate seal.[1]

SEC. 292. **The seal as evidence.** — It is said that the common seal of a corporation is not evidence of its own authenticity, but must be proved if controverted.[2] But this fact need not be shown by the agent who did it, or other person who saw it done.[3] It may be shown by any one acquainted with the seal, or the motto, or device engraved thereon.[4] If the seal is affixed to an instrument by a proper officer, this would be *prima facie*, but not conclusive evidence of the corporate assent to the instrument.[5] The affixing of the seal by a proper officer, as by the president, would, at least, furnish *prima facie* evidence of authority to so use it;[6] and the use of the seal by such an officer, purporting to be the common seal, would, at least, be presumptive evidence that it was the corporate seal.[7]

In a recent case where the concluding part of a deed was in the following language: "In witness whereof the said B. C. S. Bank by J. S., *their* treasurer, duly authorized for this purpose, have hereunto set their name and seal," and signed, "J. S., treasurer B— C— S— Bank.," and sealed, it was held to be the deed of the bank.[8]

[1] Bank of U. S. *v.* Dandridge, 12 Wheat. 68; New York R. Co. *v.* New York, 1 Hilt. 567; Merrick *v.* Burlington, etc., R. Co., 11 Ia. 75; Buckley *v.* Briggs, 30 Mo. 452; Fleckner *v.* U. S. Bank, 8 Wheat. 357; American Ins. Co *v.* Oakley, 9 Paige's Ch. 496.

[2] Jackson *v.* Pratt, 10 Johns. 281; Den *v.* Vreelandt, 7 N. J. L. 352; Foster *v.* Shaw, 7 S. & R. 163; Leazure *v.* Hillegas, id. 318; Crossman *v.* Hilltown, etc., Co., 3 Grant's Cas. 225; Mann *v.* Prentz, 2 Sandf. Ch. 271; Farmers' Turnpike Co. *v.* McCullough, 25 Pa. St. 303.

[3] Foster *v.* Shaw, 7 S. & R. 163; Darnell *v.* Dickens, 4 Yerg. 7; Moises *v.* Thornton, 8 T. R. 304.

[4] City Council *v.* Moorehead, 2 Rich. 430; Moises *v.* Thornton, 8 T. R. 304.

[5] Leggett *v.* New Jersey Manuf. Co., 1 N. J. Eq. 541; Reed *v.* Bradley, 17 Ill. 321.

[6] Hopkins *v.* Gallatin Turnpike Co., 4 Humph. 403.

[7] Mill Dam Foundry *v.* Hovey, 21 Pick. 428; Flint *v.* Clinton Co., 12 N. H. 434. See, also, Miller *v.* Ewer, 27 Me. 509; Josey *v.* Railroad Co., 12 Rich. 134; Bowen *v.* Irish Presb. Cong., 6 Bosw. 263.

[8] Hutchins *v.* Byrnes, 9 Gray, 367. See, also, Haven *v.* Adams, 4 Allen, 80; Sherman *v.* Fitch, 98 Mass. 59; Eureka Co. *v.* Bailey Co., 11 Wall. 488; Tenney *v.* Lumber Co., 43 N. H. 343. But for contrary opinion, Hatch *v.* Barr, 1 Ohio, 390; Brinley *v.* Mann, 2 Cush. 337. See, also, Bank of the Metropolis *v.* Guttschlick, 14 Pet. 19.

CHAPTER XI.

BY-LAWS.

SEC. 294. **General principles relating to by-laws.** — Incident to and inherent in every corporation is the right to make by-laws, to regulate the management of its affairs and to fulfill the purposes of its institution.[1] The constating instruments seldom, if ever, provide in detail for the mode of executing the powers, express or implied, conferred upon a corporation, but such matters are left to be regulated by the corporation itself. In the absence of provisions in the constating instruments relating to by-laws, the power primarily vests in the corporate body.[2] But these instruments, especially in private corporations for pecuniary profit, usually provide for and vest the power of making by-laws in the board of directors.[3]

[1] 2 Kent's Com. 296; Green's Brice's UltraVires, 12; Dunston *v.* Imperial Gas Co., 3 B. & Ad. 125; Everett *v.* Grapes, 3 L. T. (N. S.) 669; 1 Bl. Com. 476; Redf. on Rail., § 26.

[2] 2 Kent's Com. 296; People *v.* Throop, 12 Wend. 183; Child *v.* Hudson Bay Co., 2 P. Wms. 209; Salem Bank *v.* Gloucester Bank, 17 Mass. 29; Morton Gravil R. Co. *v.* Wysong, 51 Ind. 4; Martin *v.* Nashville Build. Assoc., 2 Codw. 332.

[3] 2 Kent's Com. 296; *Ex parte* Willcocks, 7 Cow. 402; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 124; Rex *v.* Westwood, 7 Bing. 1.

SEC. 295. **Requisites of, and construction of law relating to by-laws.** — It is a universally recognized doctrine that by-laws, whether made by the corporate body or a duly constituted and select body of persons, must not be repugnant to the constating instruments or the laws of the land,[1] nor in excess of the powers specifically conferred in this respect.[2]

If the constating instruments provide for and enable the company, or the directors, to make by-laws for particular and certain specified purposes, this, on the maxim *expressio unius est exclusio alterius*, would undoubtedly exclude the making of by-laws for other purposes.[3] This doctrine is equally applicable to municipal as to private corporations. SAWYER, J., observes in relation to this rule of construction as applicable to the latter class as follows: "The power to make by-laws when not expressly given is implied as an incident to the very existence of a corporation; but in case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication."[4]

SEC. 296. **By-laws must be reasonable, and not oppressive, nor contrary to the laws of the state.** — Whether the power to make by-laws, is expressly conferred or implied from the constating instruments, such power is always subject to the restriction, that such by-laws

[1] United States v. Hart, 1 Pet. (C. C.) 390; Bank v. Lanier, 11 Wall. 369; Case of Phil. Sav. Bank, 1 Whart. 461; Butchers' Association, 35 Pa. St. 151; Kenebec R. Co. v. Kendall, 31 Me. 470; Jay Bridge Co. v. Woodman, 31 id. 578; People v. Tibbets, 4 Cow. 382; Auburn Academy v. Strong, Hopk. Ch. 278; Philips v. Wickham, 1 Paige, 590; Seneca Bank v. Lamb, 26 Barb. 595; Davis v. Meeting House, 8 Metc. 321; Carr v. St. Louis, 9 Mo. 190; State v. Conklin, 34 Wis. 21.

[2] Free School v. Flint, 13 Metc. 539; Bullard v. Bank. 18 Wall. 594; Bank v. Lanier, 11 id. 369. But see Lockwood v. Merchants' Nat. Bank, 9 R. I. 308; Dubois v. Augusta, Dudley (Ga.), 30; Williams v. Augusta, 4 Ga. 509; Adams v. Mayor, etc., 29 id. 56.

They cannot contravene the constitution. People v. Crockett, 9 Cal. 112. Nor the fundamental rules of common law. People v. Tibbets, 4 Cow. 382; Kennebec, etc., R. Co v. Kendall, 31 Me. 470; Hayden v. Noyes, 5 Conn. 391; Adley v. Whitstable Co., 17 Ves. 315; Taylor v. Griswold, 2 Green (N. J.), 222.

[3] Child v. Hudson Bay Co., 2 P. Wms. 207; 2 Kyd on Corp. 102; Rex v. Spencer, 3 Burr. 1837; Dill on Mun. Corp., § 250; Redf. on Rail., § 26, par. 3.

[4] State v. Ferguson, 33 N. H. 424. See, also, Heisembittle v. Charleston, 2 McMullen, 233; Wadleigh v. Gilman, 3 Fairf. (Me.) 403; State v. Clark, 8 Fost. (N. H.) 176; State v. Freeman, 38 N. H. 426; Commonwealth v. Turner, 1 Cush. 493; Collins v. Hatch, 18 Ohio, 523; New Orleans v. Philippi, 9 La. Ann. 44; State v. Morristown, 33 N. J. L. 57.

must be reasonable, not oppressive, nor contrary to public policy, or the laws of the state. And this doctrine is applicable, not only to private but to municipal corporations.[1] So, by-laws must be fair and impartial and not in restraint of trade.[2] Thus, it has been held that a by-law, restraining a person from exercising the art of painting in the city of London, unless free of the company of painters, is void.[3] So, it has been held, that a by-law of a bank, that all payments made or received by the bank must be examined at the time, and mistakes corrected at the time, or the bank would not be responsible therefor, was held unreasonable and invalid, and that a recovery might still be had, for an overpayment discovered afterward.[4] But in such a case, the regulation being reasonable, it is evident that if known to the party depositing, it would impose on him the necessity of showing clearly that the mistake occurred.

SEC. 297. **By-laws in restraint of trade** — It has, however, been held in England that by-laws even in restraint of trade will be sustained, where the corporations are very ancient, and they

[1] Kip *v.* Paterson, 2 Dutch. 298; Commissioners *v.* Gas Co., 12 Pa. St. 318; Fisher *v.* Harrisburg, 2 Grant's Cas. 291; Commonwealth *v.* Robertson, 5 Cush. 438; Waters *v.* Leech, 3 Ark. 110; Mayor *v.* Winfield, 8 Humph. 767; People *v.* Throop, 12 Wend. 183; Mayor *v.* Beasley, 1 Humph. 232; State *v.* Freeman, 38 N. H. 426; White *v.* Mayor, etc., 2 Swan 564; Pedrick *v.* Bailey, 12 Gray, 161; Dunham *v.* Rochester, 5 Cow. 462; Dill. on Mun. Corp., § 253. They must be reasonable and not oppressive or vexatious. Commonwealth *v.* Gill, 3 Whart. 228; St. Luke's Church *v.* Matthews, 4 Des. Ch. 578; People *v.* Crockett, 9 Cal. 112; Howard *v.* Savannah, Charlt. 173; See, also, Slee *v.* Bloom, 19 Johns. 456; Davis *v.* Prop. of Meeting-house, 8 Metc. 321; Amesbury *v.* Insurance Co., 6 Gray, 596; Cooper *v.* Frederick, 9 Ala. 738; Commissioners, etc., *v.* Gas Co., 12 Pa. St. 318; Green's Brice's Ultra Vires, 12 *et seq.;* Mayor, etc., *v.* Winfield, 8 Humph. 707; Mayor, etc., *v.* Beasly, 1 id. 232; St. Louis *v.* Weber, 44 Mo. 547; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470.

[2] Tailors, etc., *v.* Ipswich, 11 Rep. 53; Chamberlain, etc., *v.* Compton, 7 D. & R. 601; King *v.* Coopers' Co., 7 T. R. 543; Clark *v.* Lecren, 9 B. & C. 52. But it has been held that a by-law is not in restraint of trade, which requires loaves of bread baked for sale to be of specified weight and properly stamped, or which requires bakers in a city to be licensed. Mayor, etc., *v.* Yuille, 3 Ala. 137.

Whether a by-law is reasonable is to be decided by the court. Commonwealth *v.* Worcester, 3 Pick. 473.

[3] Clark *v.* Lecren, 9 B. & C. 52; Chamberlain, etc., *v.* Compton, 7 D. & R. 597.

[4] Mechanics and Farmers' Bank *v.* Smith, 19 Johns. 115; Gallatin *v.* Bradford, 1 Bibb, 209; Hayden *v.* Noyes, 5 Conn. 391; Peck *v.* Lockwood, 5 Day 22; Marietta *v.* Fearing, 4 Ohio, 427; *Ex parte* Burnett, 30 Ala. 461; Austin *v.* Murray, 16 Pick. 121; Milhau *v.* Sharp, 17 Barb. 435; 27 N. Y. 611; Dunham *v.* Trustees, etc., 5 Cow. 462; Strauss *v.* Pontiac, 40 Ill. 301; Austin *v.* Murray, 16 Pick. 125; Wreford *v.* People, 14 Mich. 41.

"are supported by special customs which supposes a former grant of a monopoly."[1] But in such cases the custom must be strictly proved to be in harmony with the by-laws; and the doctrine cannot be applied to new corporations.[2]

SEC. 298. **By-laws adopted by the corporate body.**—If by-laws are lawfully framed and adopted by the corporate body, relating to the powers and duties of the directors, they become as to them the fundamental law, and hence a board of directors can no more disregard such by-laws of the corporate body than they could the provisions of the incorporating statute or other constating instruments.[3]

SEC. 299. **By-laws adopted by directors.**—Where the directors have authority conferred upon them, to make by-laws, either by the constating instruments or by the corporation, they may adopt such as they deem proper, provided they come within the scope of the authority conferred upon them. In the exercise of this

[1] Bosworth v. Budgen, 7 Mod. 459; Colchester v. Goodwin, Carter, 117; Bricklayers and Plasterers, Palm. 395, Hardres, 56; Player v. Jones, 1 Vent. 21; Broadnox's Case, id. 196; Bosworth v. Hearne, Andre, 97; 2 Stra. 1085; *Case temp.* Hardw. 408; Player v. Vere, T. Raym. 288; Bodwic v. Fennell, 1 Wils. 233; Harrison v. Goodman, 1 Burr. 16; Hesketh v. Braddock, 3 id. 1858; Wooley v. Idle, 4 id. 1952; The King v. Coopers' Co., 7 T. R. 543; The King v. Tappenden, 3 East, 186; Chamberlain, etc., v. Compton, 7 D. & R. 601; Clark v. Denton, 1 B. & Ad. 92; Clark v. Le Crean, 9 B. & C. 52.

[2] Hesketh v. Braddock, 3 Burr. 1858; Colchester v. Goodwin, Carter, 117. But see Fazakerly v. Wiltshire, 1 Stra. 466; Bolton v. Throgmorton, Skin. 55. But see Wilc. on Corp. 146. See, also, as to ordinances of municipal corporations in restraint of trade, Dunpan v. Rochester, 5 Cow. 462; Freeholders v. Barber, 2 Halst. 64.

On the subject of the reasonableness of by-laws, see People v. Medical Soc. of Erie, 24 Barb. 570; S C., 32 N. Y. 187. See, also, State v. Ferguson, 33 N. H. 430; Phillips v. Allen, 41 Pa. St. 481; Kirk v. Nowill, 1 T. R. 124; White v. Tallman, 2 Dutch. 67; Hart v. Albany, 9 Wend. 588; Peoria v. Calhoun, 29 Ill. 317; St. Paul v. Coulter, 12 Minn. 41.

But "in this country," observes Mr. Dillon, "corporations derive all their powers from legislative acts of comparatively modern date, and prescriptive customs, in restraint of trade or against common right, are unknown." Dill. on Mun. Corp., § 258; Commonwealth v. Stodder, 2 Cush. 562, Herzo v. San Francisco, 33 Cal. 134.

[3] See opinion of Justice MILLER, in Samuel v. Holladay, 1 Woolw. (C. C.) 400; Cummings v. Webster, 43 Me. 192; Anacosta Tribe v. Murbach, 13 Md. 91; Brick Pres. Church v. Mayor, etc., 5 Cow. 538; McDermott v. Board, etc., 5 Abb. Pr. 442.

But the legislature cannot authorize the making of a by-law contravening, repealing, or in anywise changing the statutory or common law of the land. Seneca County Bank v. Lamb, 26 Barb. 595; Kynaston v. The Mayor, etc., 2 Stra. 1051; King v. Theodorick, 8 East, 543; Stow v. Wyse, 7 Conn. 214; Warner v. Mower, 11 Vt. 385; State v. Ancker, 2 Rich. 245.

power they may do whatever the corporate body itself might in this respect have done, if the power had not been vested in them.

If the authority is conferred upon them by the constating instruments, it is exclusive of the authority of the corporate body to act in the premises.[1]

But, if the authority is conferred by the corporation upon them, such authority may, like the authority of an agent generally, be revoked at any time. But such revocation could not affect the vested rights of parties, by virtue of the powers exercised by such agents before such revocation.

The acts of such directors, however, will be in all cases subject to such limitations and restrictions in the adoption of by-laws as we have noticed is imposed upon the corporate body itself in this respect. In fact the authority to the directors may be even more limited than that possessed by the body itself, where the authority proceeds from it.[2] In such a case the power to act must depend upon the provisions of the act conferring it. But if it is one in general to make such by-laws as may be necessary and proper to regulate and conduct the business of the corporation, then it would be construed as giving them complete authority in that respect, limited only in the manner we have stated where they are framed by the corporate body. But we have already considered this subject in treating of directors.

SEC. 300. **Distinction between by-laws adopted by the corporation and those adopted by directors.**—The distinction between by-laws

[1] Dana *v.* Bank of U. S., 5 W. & S. 247; MARSHALL, C. J.. in Bank of U. S. *v.* Dandridge, 12 Wheat. 113; Dayton, etc., R. Co. *v.* Hatch, 1 Dis. 84; Conro *v.* Port Henry Iron Co., 12 Barb. 27, in which the court say: "It is quite obvious from the charter that the company could do no act except through the directors. When the charter prescribes the mode of its action, its injunctions must be rigidly pursued. * * * The stockholders in this case had no power to make a lease, or do any other administrative act in the management of the affairs of the corporation. If a lease could be made at all, it could be executed only in pursuance of the act of the directors, who are the body appointed by the charter for the management of its affairs. It is no answer that individual stockholders who were present at the meeting when the lease was ordered, were also directors. They did not meet and act as directors, but as stockholders."

[2] If the general power of making by-laws is, by the provisions of the charter, vested in the corporation itself, it may circumscribe the powers of the board of directors. Salem Bank *v.* Gloucester Bank, 17 Mass. 29. See, also, Fleckner *v.* United States Bank, 8 Wheat. 338; State of La. *v.* Bank of La., 6 La. 745; Whitewell, Bond & Co. *v.* Warner, 20 Vt. 425; Ridgeway *v.* Farmers' Bank, 12 S. & R. 256.

adopted by the corporate body and those of the directors is pointed out by Mr. Justice MILLER in a recent case, in which it was attempted to set aside a trust deed as void, because the meeting of the board of directors at which the president of the company was authorized to execute the instrument, was held without the notice prescribed for such meetings by a by-law adopted by the directors. He says: "Such a by-law, when made by the board of directors for their government, cannot be extended to affect contracts with third persons. There are many cases in which it has been held that notice of special meetings must be given as required by the by-laws, or the meetings would be wholly without authority, and all business attempted to be then done would be of no binding force upon the corporation. But in all these cases, and in all others in which the same rule is laid down, the by-laws were made by the stockholders at the annual and stated meeting, under the authority and direction of a provision of the charter. In such cases the stockholder may be supposed to retain a control over the management of their affairs and intend to put a restraint upon their agents. Their will, expressed in the by-laws, becomes a rule to the directors. It cannot be disregarded any more than a provision in the charter. But the reason for the rule fails when the by-law is made by the directors for the government of themselves in the management of the business of the corporation. The same power which enacts can repeal the law. It is a mere guide for their own convenience, and for the orderly conduct of their business. It cannot be extended to affect the validity of acts done in disregard of it, especially when third parties are concerned."[1]

We have already considered the subject of notice as imparted by the by-laws, and the acts, documents and instruments for incorporation, in treating of directors and agents.[2]

[1] Samuel v. Holladay, 1 Woolw. (C. C.) 400. See, also, Brick Presbyterian Church v. The Mayor, etc., 5 Cow. 538; The Mechanics', etc., Bank v. Smith, 19 Johns. 115; Seneca Co. Bank v. Lamb, 26 Barb. 595; Com. Dig., tit. By-law, ch. 2; Dodwell v. The University of Oxford, 2 Vent. 33; Vandine, Petitioner, 6 Pick. 187; Sargent v. The Essex Marine R. Co., 9 id. 202; Commonwealth v. The Mayor, etc., 5 Watts, 152. See, also, *post*, § 307.

[2] See ch. 6 and 7. See, also, Fay v. Noble, 12 Cush. 1; Wyman v. Hallowell, etc., Bank, 14 Mass. 58; State v. Commercial Bank, 6 S. & M. 237: Risley v. Ind. B. & W. R. Co., 1 Hun, 202; Adriance v. Roome, 52 Barb. 399; Lowell Sav. Bank v. Winchester, 8 Allen, 109.

SEC. 301. **By-laws contrary to the general laws of the land, void.** — It has been noticed that by-laws contrary to the laws of the land were void; but a fuller statement and illustration of the subject may be required.

And first, we may say that a by-law of the directors, who receive their authority directly from the corporate body, in conflict with any by-law or regulation of the body itself, would be void.[1] For, as in such a case the powers of the agents are subordinate, on general principles, to the authority of the principal, the principal may prescribe and limit the authority of the agent in any manner that may be deemed proper.

Secondly, the by-laws of either the directors or of the corporate body must not conflict with the provisions of the charter, corporate act, articles of association, deed of settlement, certificate, or other original and constating instruments.[2] These become, by acceptance and adoption, the fundamental law of the institution, the constitutional law of the body, and paramount to the by-laws which may be adopted.

Thirdly, they must not conflict with the constitution of the state, or of the general government. For, as the legislature has no authority to pass laws in conflict with such constitution, so it of course follows that they cannot authorize others to do so; and any by-law in conflict with either, or that authorizes any infringement of personal rights or privileges secured to individuals by either, would be null and void. Therefore, no by-law can impair the obligation of a contract, or provide for the taking of the private property of a person for the use of the corporation, without just compensation,[3] or authorize the violation of any other rights secured by constitutional provisions,[4] or impose any personal or individual liability beyond such as is specified in the charter,

[1] Salem Bank v. Gloucester Bank, 17 Mass. 29. See, also, Whitewell v. Warner, 20 Vt. 425; Bank of Middlebury v. Rutland, etc., R. Co., 30 id. 159; Augusta Bank v. Hamblet, 35 Me. 491; Hoyt v. Thompson, 19 N. Y. 207.

[2] Hoyt v. Shelden, 3 Bosw. 267; Hoyt v. Thompson, 19 N. Y. 207; Rex v. Spencer, 3 Burr, 1839; King v. Ginever, 6 T. R. 735. See, also, State v. Curtis, 9 Nev. 325 (1874).

[3] Ang. & Am. on Corp., § 333; Stuyvesant v. Mayor, 7 Cow. 585; New York v. New York, 3 Duer, 119.

[4] Id. See, also, Coates v. New York, 7 Cow. 604; Goszler v. Georgetown, 6 Wheat. 593; Bank v. Lanier 11 Wall. 369; Kennebec R. Co. v. Kendall, 31 Me. 470; Jay Bridge Co. v. Woodman, id. 573; Carr v. St. Louis, 9 Mo. 190; State v. Conklin, 34 Wis. 21.

incorporating laws, or other constating instruments under which it is constituted.[1]

Fourthly, by-laws infringing the laws of congress, made in pursuance of the constitution,[2] the general statutes of a state, or particular statutes relating to the corporation (provided these do not impair the obligation of the charter), are void.[3]

Fifthly, they must not be contrary to the general principles of the common law, as recognized in the state, or of general public policy.[4]

SEC. 302. It is true, however, that the legislature, having paramount authority, except so far as restrained by the constitution of the state, may authorize acts which interfere with rights which may be said to be generally possessed by persons.[5] This subject has been illustrated by Mr. Justice EVANS as follows: "If there was no law interfering, the butcher might kill his hogs and beeves in the street. If the butcher could do it any man might, and it might, therefore, be said to be a common right; but when the law prohibited it, it was no longer a common right. A legal restraint may be imposed on a few for the benefit of the many." [6]

[1] Taylor v. Griswold, 2 Green (N. J.), 222; Lee v. Wallis, 1 Key. 292; Sayer, 262; People v. Tibbets, 4 Cow. 382; Kennebec R. Co. v. Kendall, 31 Me. 470.

And it has been held that a by-law, which assumes to prohibit the transfer of stock by the owner, because he is indebted to the company, is ultra vires and void. Driscoll v. West Bradley Man. Co., 36 N. Y. Superior Court, 488.

[2] Free School v. Flint, 13 Metc. 539.

[3] United States v. Hart, 1 Pet. (C. C.) 390.

[4] Norris v. Staps, Hob. 211; Clark's Case, 5 Rep. 63. See By-laws, 3 Salk. 76; Rex v. Barber Surgeons, 1 Ld. Raym. 585; Rex v. Miller, 6 T. R. 277; Rex v. Haythorne, 5 B. & C. 425; Williams v. Great Western R. Co., 10 Exch. 15; 28 Eng. L. & Eq. 439; Butchers' Ben. Association, 35 Pa. St. 151; Auburn Academy v. Strong, 1 Hopk. Ch. 278; Jay Bridge Co. v. Woodman, 31 Me. 573; Connecticut R. Co. v. Bailey, 24 Vt. 465.

[5] Taylor v. Griswold, *supra*. See, also, Philips v. Wickham, 1 Paige, 598.

[6] City Council v. Ahrens, 4 Strobh. (S. C.) L. 241; City Council v. Baptist Church, id. 306; Peoria v. Calhoun, 29 Ill. 317; St. Paul v. Colter, 12 Minn. 41; 1 Dill. on Mun. Corp., §§ 259, 263; Ang. & Am. on Corp., § 336 *et seq.*

Angel & Ames, in their work on Corporations, refer to the subject of by-laws void for various reasons, as follows: "As transcending the charter, by-laws creating a new office, imposing an oath of office where none is provided by the constitution [of the corporate body], giving a vote to a person or a casting vote to an officer who is not entitled to it by the charter, restricting the right of an officer to vote to a mere casting vote in case of a tie, restricting or extending the right of admission or eligibility to office, or restricting the discretionary power of removing a master or usher of a grammar school vested in the governors, as given by the charters, altering the prescribed mode of election, or imposing new and additional tests or qualifications on members or voters; delegating the power of laying assessments

SEC. 303. **Matters that may be regulated by by-laws.**— The term "by-law" is used to designate those regulations which a corporation has a right to make, either directly as a corporate body, or by a

to the directors when the charter or general law vests it exclusively in the corporation, or changing the salaries of officers, or imposing a personal liability for the debts of the corporation not contemplated by the charter, are void. And where a by-law confers the right of voting by proxy, or imposes the ownership of a certain number of shares as a qualification for office or admission, there being nothing in the charter expressed or implied specially authorizing such by-law, or, where in cases of a 'savings institution,' a by-law is passed, prescribing that persons owning one share of the capital required to be invested for the purpose of security to the depositors, should be members, and should cease to be members upon its transfer, the by-law is held void, as invading the spirit and meaning of the charter. So, where the act incorporating an insurance company gave a vote for each share of stock, but provided that no share should entitle the holder to a vote unless the stock should have been held by him at least sixty days next and immediately preceding an election, and provided that the major part of the directors should constitute a board, with power to pass such by-laws as to them should appear needful and proper respecting elections, and they passed a by-law requiring a transfer of stock to be registered in order to be effectual, it was held that a by-law requiring the inspectors of elections, whenever they should or might suspect that stock voted on had been sold or bargained for within the sixty days, but not transferred on the books, to oblige the person proposing to vote on such stock to adduce satisfactory proof, either by his own oath or affirmation or otherwise, that the stock had not been sold, or the beneficial interest parted with by any bargain or contract within the sixty days, and in default of such proof to reject the vote, was void; and that the vendor might vote, notwithstanding the transfer within sixty days, the same being unregistered; the inspectors having no right to require other tests of a voter than those provided in the act of incorporation, and it not being competent to the directors to pass any by-law at variance with the provisions of the same. An act incorporating a church provided that the vestry should be elected 'in the manner accustomed,' which was at a certain time and place, by the inhabitants of the parish, being of the religion of the church of England, and possessing certain other enumerated qualifications. It was held that a by-law made by the vestry, enacting that no person should be admitted a member of the church, or be entitled to the privilege of a vote in the election of the vestry, unless he should pay the sum of fifty dollars, a qualification not named in the charter, was void; inasmuch as 'it required a new qualification to entitle persons otherwise entitled to vote, and was therefore an attempt to transcend the powers given, and to alter the qualifications of the voters, and was a violation of the charter.'

And generally, where the charter vests the admission of members in the body at large, a power vested in the directors, to provide for the admission of members, gives them only a right to prescribe in their by-laws, the time, place, and manner of holding the election of members, and not the right to pass a by-law imposing a test of membership not contemplated by the charter, as the ownership of a share in the capital stock of a 'savings institution.' In a recent case in England, it was decided, that a by-law of a navigation company, that the navigation should be closed on Sundays, except for works of necessity, and for the purpose of going to and returning from any place of divine worship, was not authorized by a charter empowering the company to make by-laws for the good government of the company and for the good and orderly using of navigation, and also for the well governing of the bargemen, watermen, and boatmen, who should carry goods on any part of the navigation, on the ground, that the power of making by-laws was vested in them solely for the orderly use of the navigation, and

select body of its own members, by virtue of a power conferred by the corporation, the statute or constating instruments. These by-laws or regulations may, in fact, be a part of the constating instruments. But they are usually, in cases of corporations for pecuniary emolument, referred to the board of directors to frame and adopt; and they may properly regulate all those internal affairs of the corporation, in the prosecution and management of the business for which it was organized, and for the management of which there are no other regulations in the charter or constating instruments.

SEC. 304. The statute and other corporate and constating instruments are the superior or constitutional law of the corporation; by which the authority is conferred upon the corporate body, or a select body of the corporators, to frame by-laws, for the general management of the business of the corporation, subject to the limitations specifically prescribed, and such as we have noticed as on general principles are applicable thereto. And by-laws thus legally adopted have, in respect to the matters of which they are appropriately the subject of regulation, the force and effect of a legislative act.[1]

Thus, subject to the conditions before stated, they may provide for the time and place of meeting of the stockholders; for the time and manner of giving notice thereof; how the directors shall be elected; in what way the will of the members shall be expressed, as by ballot or otherwise; how vacancies in the board of directors may be filled; how the other officers shall be appointed

not for the purpose of controlling the moral or religious conduct of carriers along the navigation, which is to be left to the general law of the land, and to the laws of God." Ang. & Am. on Corp., § 365. See, also, Rex v. Bird, 13 East, 384; Rex v. Ginever, 6 T. R. 736; McCullough v. Annapolis R. Co., 4 Gill. 58; Rex v. Coopers, etc., 7 T. R. 548; Rex v. Attwood, 1 Nev. & M. 286; Rex v. Weymouth, 7 Mod. 373; Queen v. Governors, etc., 6 Q. B. 682; Queen v. Saddlers' Co., 10 H. L. Cas. 414; 3 Ellis & E. 42, 4 Best & S. 570; *Ex parte* Winsor, 3 Story, 411; Carr v. St. Louis, 9 Mo. 191; Free Sch., etc., v. Flint, 13 Metc. 539; Kennebec R. Co. v. Kendall, 31 Me. 470; Phillips v. Wickham, 1 Paige, 598; Taylor v. Griswold, 2 Green (N. J.), 223; Commonwealth v. Gill, 3 Whart. 228; Andrews v. Union Ins. Co., 37 Me. 256; People v. Tibbets, 4 Cow. 358; Rollins v. Columbia Ins. Co., 5 Fost. 200; Calder Navigation Co. v. Pilling, 14 M. & W. 75.

[1] Heland v. Lowell, 3 Allen, 407; Church, v. City, etc., 5 Cow. 538; St. Louis v. Boffinger, 19 Mo. 13; McDermott v. Board of Police, 5 Abb. Pr. 422; Taylor v. Carondelet, 22 Mo. 105; Hopkins v. Mayor, etc., 4 M. & W. 621.

or elected, and their qualifications; what number shall constitute a quorum at meetings held by directors; how vacancies in offices shall be filled; how committees shall be appointed, and their powers and duties; how special or general agents may be appointed, and their duties, qualifications and powers; when and where meetings of the board of directors, or of the corporate body shall be held, or when called, and what notice of the same shall be given; what bond if any shall be required of officers, and who shall approve of the same; what books of the company shall be kept, and by whom and how, and for what purpose; how the by-laws may be repealed or amended; for the transfer of stock from one to another; and for securing to the corporation a lien on all such stock, for all debts due the corporation. Of course the by-laws, whether made by the corporate body or by the board of directors, can confer no power upon themselves or their agents not possessed by the corporation. And any attempt to exercise such powers would be ultra vires and, as we have seen, void. The distinction between a corporation and an individual in this respect is, that a corporation is an artificial person created for a specific purpose, and its powers are limited by the acts and instruments of its creation, and it can only execute such contracts and perform such acts as it is authorized to make and perform, in this respect differing from a natural person who may perform all acts, and execute all contracts which are not forbidden by some positive law.[1] The rights of natural persons in this respect are limited only by provisions of law, or public policy, which is a part of the law.

A corporation authorized by statute to make by-laws for the management of its property, the regulation of its affairs, and the transfer of its stock, has power to make a by-law providing that no transfer of stock shall be made upon the books of the corporation until after the payment of all indebtedness to the corporation due from the person in whose name the stock stands on its books.[2]

[1] Root v. Wallace, 4 McLean (C. C.), 8; Davis v. Bank, etc., id. 387; Gage v. New Market R. Co., 18 Q. B. 457; 14 Eng. L. & Eq. 57; Preston v. Liverpool R. Co., 5 H. L. Cas. 605. But by-laws can have no retroactive effect. And *ex post facto* laws by corporations are no more lawful for corporations than for states. Pulford v. Fire Dept. of Detroit, 31 Mich. 458.

[2] Pendergrast v. Bank of Stockton, 2 Saw. 108.

And if the making of by-laws vests in the corporate body, it may confer

SEC. 305. **How by-laws are made.**—In treating of corporate meetings we stated the manner in which the corporate will was expressed, viz.: by the voice or vote of the majority, and that this majority was, unless otherwise provided, the voice or vote of those representing a majority of the stock; each share entitling the holder to a vote on all questions submitted at a meeting of the corporate body. If the power to adopt by-laws is conferred upon the directors, a majority of them, or of those constituting a quorum for doing business, may adopt or enact them.[1]

But in whatever manner, either by the corporate body or by the board of directors, they may be enacted, it should be done at a meeting duly called and lawfully held. If there is a mode of enacting by-laws prescribed by the constating instruments, that mode must be pursued;[2] but in the absence of any prescribed mode, such by-laws are usually prepared by some committee appointed for that purpose by the corporate body or the board of directors, as the case may be, and adopted by resolution or otherwise, by such body or board, at a lawful meeting, and duly recorded by the proper officer.[3]

This is the usual and regular way of enacting or making by-laws; but it has been held that this mode of adopting them is not absolutely essential. In fact, it appears from the adjudications that by-laws may be inferred, without proof of their actual or formal adoption in any manner by the corporation or the directors. Thus, as it has been observed of a corporation, "that it may adopt by-laws, as well by its own acts and conduct, and the acts and conduct of its officers, as by an express vote or an adoption in writing."[4]

the power on the board of directors, and they may be limited by them. Salem Bank v. Gloucester Bank, 17 Mass. 29.

[1] Wilcocks, 7 Cow. 402; Cahill v. Kalamazoo Ins. Co., 2 Doug. (Mich.) 124. See, also, *ante*, ch. 8.

[2] Dill. on Mun. Corp. § 246 and notes.

[3] Dill. on Mun. Corp., §§ 244, 245, 246 and notes; State v. Jersey City, 3 Dutch. (N. J.) 493; Sower v. Philadelphia, 35 Pa. St. 231; Gas Co. v. San Francisco, 6 Cal. 190; Municipality v. Cutting, 4 La. Ann. 335; Cincinnati v. Gwynne, 10 Ohio, 192; Markle v. Akron, 14 id. 586.

[4] Union Bank, etc. v. Ridgely, 1 Harr. & G. 324; Fairfield v. Thorp, 13 Conn. 173; Langsdale v. Bonton, 12 Ind. 467. On this subject Angell & Ames in their work on Corporations, observe: "In the case of the Union Bank of Maryland v. Ridgely, 1 Harris & G. 324, where it appeared that, by charter, the president and directors of the bank were authorized to make all such by-laws and regulations for the government of the corporation, its officers and

SEC. 306. **Repeal of by-laws.** — It is a common doctrine relating to legislative bodies, that where they have authority to make laws they have also authority to repeal them; and that the power to make includes the power to repeal. This doctrine is applicable to private corporations, and they or the boards of directors may not only make by-laws for the regulation and management of their affairs, but amend or repeal the same.[1]

The general doctrine in reference to legislative bodies is, that no such body can part with its privileges so as to prevent the exercise of the same again, and hence that they may repeal or modify any act passed by them. But this doctrine does not apply to those cases of grant of rights and privileges to private corporations, which, as we have seen, have the character of contracts, and become vested rights in the corporators. This doctrine is applicable to corporate bodies, or boards of directors thereof, in reference to by-laws. They have the power to repeal or modify the same; but this power cannot be used to impair the rights of parties which have been conferred, and are vested in them, under

members, as they or a majority of them should from time to time think fit; upon a certain writing being given in evidence, headed 'By-laws,' and which purported to have been the by-laws of the bank, while its business was transacted under articles of association, and before the act incorporating it was passed, it was objected that there was no evidence that the writing produced had been adopted as the by-laws of the corporation, there being no entry or memorandum of such adoption among the minutes of its proceedings. The court of appeals of Maryland, however, decided that authority to make by-laws being specially delegated to the president and directors, without the mode of exercising it being prescribed by the charter, it was no more necessary that their adoption should be in writing, than that the acts or contracts of any other duly authorized agent; and it being proved by the cashier that the by-laws in question were always reputed to be the by-laws of the corporation, and with the exception of two articles, were so observed by him; and by a director, that they were delivered to him as such, upon his election, and that the decisions by the board of directors were made agreeably to them in any question upon their conduct; this was held a sufficient adoption of the by-laws by the president and directors, and sufficient proof of the same, there being no record or minute of the fact." Ang. & Am. on Corp., § 328.

As a corporation has a legal existence only within the state of its creation, all acts by it, including the making of by-laws, must be within such state. Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Superior Ct. 406.

[1] 1 Dill. on Mun. Corp., § 249; Rex *v.* Ashwell, 12 East, 22; 3 T. R. 198; State *v.* Pinto, City Clerk, etc., 7 Ohio St. 355; Stoddard *v.* Gilman, 22 Vt. 568; Pond *v.* Negus, 3 Mass. 230; Bigelow *v.* Hillman, 37 Me. 52; Reiff *v.* Conner, 5 Eng. (Ark.) 241; Road Cases, 17 Pa. St. 71; Rex *v.* Westwood, 4 B. & C. 806.

and by virtue of the repealed or amended by-law. "The repeal cannot operate retrospectively to disturb private rights vested under it." [1]

SEC. 307. **Function of by-laws — effect on third parties.**—The proper function of by-laws is to regulate the management and control of corporate affairs and especially to regulate the conduct and define the duties of the members toward the corporation and between themselves. "So far as its provisions are in the nature of a contract, the parties thereto are the members of the association as between themselves, or the corporation on the one side and its individual members upon the other." [2] They are not designed to confer rights or privileges upon third parties, or strangers to the corporation, but to protect rights and secure privileges to the corporators.

Thus, where a by-law provided as follows: "The members of this association pledge themselves in their individual as well as their collective capacity to be responsible for all moneys loaned to this association, and for the payment of which the treasurer may have given his obligation agreeably to the direction of the directors," and a note was duly executed by the treasurer for the association on which payments had been made, but for the balance, the association having failed to pay it, suit was brought against the defendant as a member of the corporation, demand having first been made of him, the supreme court of Massachusetts, WELLS, J., observing: "The note upon which this action is based is the contract of the corporation. The defendant is not a party to that contract, and the plaintiff does not seek by this suit to charge him upon any statute liability as a stockholder. Responsibility for the amount of the note is sought to be established through a by-law of the corporation to which the defendant had attached his signature. To become a member of the association it was requisite to subscribe the by-laws. It does not appear that the defend-

[1] Id.; Cooley on Const. Lim. 205; East Hartford v. Hartford Bridge Co., 10 How. 535; Dill. on Mun.Corp., § 61; Debolt v. Ins. and Trust Co., 1 Ohio St. 564; Plank-road Co. v. Husted, 3 id. 578; Matheny v. Golden, 5 id. 375; Mott v. Pennsylvania, etc., R. Co., 30 Pa. St. 9; Cooley on Const. Lim. 127; Sedg. on Const. & Stat. Law, 616.

[2] Flint v. Pierce, 99 Mass. 68; Mellen v. Whipple, 1 Gray, 317; Field v. Crawford, 6 id. 116; Dow v. Clark, 7 id. 198. See, also, Trustees of Free Schools, etc., v. Flint, 13 Metc. 543.

ant's signature was attached for any other purpose than to constitute him a member of the corporation. It does not appear that the plaintiff lent his money [for which the note was given] upon the faith or credit of the individual pledge contained in the by-law; nor that the by-law was in any manner made known to him or to the public as the basis of such credit. * * * The right of any third party, stranger to the association, to establish a legal claim through such a by-law, must depend upon the general principles applicable to express contracts. * * * No action can be maintained by such third party, unless he can bring his case within some of the recognized exceptions to that general rule. A pledge like the one in question, if made for the purpose of enabling the corporation to obtain a loan upon the faith of it and used for that purpose, may perhaps give a right of action against the subscribers in favor of a party who has been induced to advance money upon its credit."[1]

SEC. 308. **By-laws regulating the transfer of stock.** — The most important matters which by-laws may regulate are those relating to the transfer of stock and securing to the corporation a lien on the same for any indebtedness of the holder to the corporation. For instance, it is sometimes provided by the by-laws of the corporation that no transfer of stock shall be made unless it is registered upon the proper books of the company, kept for that purpose. In such a case can the holder transfer or assign his stock without a compliance with the provisions of the by-laws? Or can he still transfer the interest in stock held by him, subject to the equitable claims and liens of the corporation?

On these questions there have been a variety of decisions. "A very literal construction has been given in Connecticut to such clauses, either in the charter or by-laws of a corporation; the scope and object of such provisions being, in the view of the supreme court of that state, 'to render the purchase of stock secure to any person, if at the moment of his purchase the company books did not furnish evidence that it had been previously transferred.' The settled law of Connecticut is, that where such clauses are found in the charter and by-laws, or either, the transfer

[1] Flint v. Pierce, 99 Mass. 68.

is invalid and of no effect for any purpose, unless made or registered on the books of the company. The registry is there deemed the original act in the change of title, and an entry by the clerk on the deed, 'received for record,' is not considered equivalent to a registry."[1]

SEC. 309. This, however, is not the general doctrine on this subject; the rule recognized being that such regulations are primarily if not solely for the protection of the interests of the corporation; that it is important if not necessary for the corporation to know who are the stockholders and members, not only to enable them to determine to whom dividends are to be paid, but also to determine who are entitled to vote upon stock; that this provision is necessary to enable the corporation to avail itself of a lien upon the stock held, without prejudice to purchasers and assignees; but that as between the holder and the assignee an assignment passes all the rights of the holder, at least his equitable interest, subject to the rights of the corporation, and that such a provision has application only to the relations between the stockholder and the corporation.[2]

SEC. 310. **Providing for a corporate lien on stock.** — The right of lien of the corporation on shares owned by parties, is held to be conferred only by virtue of some provision of the statutes or by-laws, and not by common law.[3] A provision, however, is sometimes contained in the statute of incorporation or other constating instruments, but more frequently in the by-laws, to the effect that no stockholder indebted to the corporation shall be authorized to make a transfer or receive a dividend, until all indebtedness to the

[1] Ang. & Am. on Corp., § 358. See, also, Northrop v. Newtown T. Co., 3 Conn. 544; Marlborough Man. Co. v. Smith, 2 id. 579; Northrop v. Curtis, 5 id. 246; Oxford v. Bunnell, 6 id. 552. But see Colt v. Ives, 31 Conn. 25.

[2] Farmers' Bank v. Iglehart, 6 Gill. 50; Stebbins v. Phenix Ins. Co., 3 Paige, 350; Union Bank v. Laird, 2 Wheat. 390; Black v. Zacharie, 3 How. 513; Quiner v. Marblehead Ins. Co., 10 Mass. 476; Grant v. Mechanics' Bank, 15 S. & R. 143; Chouteau Spring Co. v. Harris, 20 Mo. 382; Fisher v. Essex Bank, 5 Gray, 373; Sargent v. Franklin Ins. Co., 8 Pick. 90: Nesmith v. Washington Bank, 6 id. 324. See further as to an assignment of shares, *ante*, § 110 *et seq.*, and § 131 *et seq.*

[3] Union Bank v. Laird, 2 Wheat. 390; Rogers v. Huntington Bank, 13 S & R. 77; Grant v. Mechanics' Bank, 15 id. 140; Sewall v. Lancaster Bank, 17 id. 285; Utica Bank v. Smalley, 2 Cow. 770; Steamship Dock Co. v. Heron, 52 Pa. St. 280.

corporation is discharged. And in case of such a provision it has been held to embrace not only an amount due for the original subscription, but also any debt due from the stockholder on notes discounted, where he is either principal or surety.[1]

SEC. 311. The lien thus created will also cover dividends as well as the shares of stock, although only shares may be designated.[2] But in New York, where a stockholder of a bank which had such a by-law sold his stock to a purchaser who had no notice of the by-law, and the bank gave the assignor credit before a transfer of the stock was made on its books, and before notice of his assignment, it was held that the purchaser had an equitable title to the stock free from any lien on the part of the bank.[3]

[1] Brent *v.* Bank of Washington, 10 Pet. 596; McDowell *v.* Bank of Washington, 1 Harr. (Del) 27; St. Louis Ins. Co. *v.* Goodfellow, 9 Mo. 149; Farmers' Bank *v.* Iglehart, 6 Gill. 50.

[2] Hague *v.* Dandeson, 2 Exch. 741.

[3] Bank of Attica *v.* Manufacturers' Bank, 20 N. Y. 501.

Of the right of banking corporations under such provisions it has been observed: "It is not defeated or prevented from attaching by a transfer to a fictitious holder, and subsequently by a person represented by the indebted stockholder to be that holder to one who pays no consideration for it; nor does it yield to a claim of priority on the part of the general government. Such lien being intended solely as a protection to the bank for debts due to it, equity will not compel the bank to enforce it in favor of the sureties on such debts, on the ground that it was intended for the benefit of sureties, and giving precedence to debts prior in date, although upon general principles it might interpose at the suit of the sureties to prevent an abuse by the directors of the power conferred upon them by the clause giving the lien. And where the charter of a corporation, authorized to lend money, enacts that the stock shall be assignable on the books of the corporation under such regulations as the board of trustees shall establish, it is competent for the trustees to enact a by-law that 'no stockholder shall be permitted to transfer his stock while he is in default.' If a stockholder borrow money of a bank, with full knowledge of a usage not to permit a transfer of his stock while he is indebted to the bank, he is bound by such usage, and neither he nor his assignee, under a voluntary general assignment, can maintain an action against the bank for refusing to permit his stock to be transferred. A by-law of a bank giving to the institution a lien upon the shares of a stockholder, for debts due from him to the bank, is a reasonable and valid by-law, and under it a bank may defend against a suit brought by a stockholder for a refusal to permit him to transfer his stock on its books without first paying the debts he owes to it. Whether, however, a by-law of a corporation, merely as such, can create a general lien on the shares of a stockholder to the amount of the debts due from him to the bank, so as to effect the rights of creditors, or of a special assignee for value, without notice of the restriction, has been considered questionable." Ang. & Am. on Corp., § 355. See, also, Stebbins *v.* Phenix Ins. Co., 8 Paige 350; Brent *v.* Bank, etc., 10 Pet. 596; Cross *v.* Phenix Bank, 1 R. I. 39; Cunningham *v.* Alabama Ins. Co., 4 Ala. 652; St. Louis Ins. Co. *v.* Goodfellow, 9 Mo. 149; Morgan *v.* Bank of North America, 8 S. & R. 73; Nesmith *v.* Bank of Washington, 6 Pick. 329; Plymouth Bank *v.* Bank of Norfolk, 10 id. 454; Steamship Dock Co. *v.* Heron, 52 Pa. St 280; Bank of Attica *v.* Manufacturers' Bank, 20 N. Y. 501.

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CHAPTER XII.

LIABILITY OF CORPORATIONS FOR TORTS.

SEC. 315. **General principles relating to the liability of, for torts.** — When it is considered that a corporation is a mere ideal and immaterial person, it may appear unreasonable that it can be guilty of a wrong or tort; but when we reflect that it must always execute its will through agents, and that the principal is always responsible for the torts of agents, committed in the performance

of the duties conferred upon them, it will be seen that, after all, a corporation should be liable for torts done and committed by agents while acting within the general scope of their authority.[1]

In an English case, Lord COTTENHAM said: "Strictly speaking, a corporation cannot itself be guilty of fraud. But when a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."[2]

SEC. 316. The common law in relation to the liability of the principal for the tortious acts of the servant, generally, is equally applicable to the relation between a corporation and its servants and agents. In relation to this liability, it may be affirmed that the master or principal, as the case may be, is liable for any negligence, misfeasance, or omission of duty of the servant or agent, which occurs in the discharge of the duty, or that comes within the scope of the authority conferred upon him.[3] "And this liability," observes

[1] Phil. & Read. R. Co. *v.* Derby, 14 How. 468; Noyes *v.* Rut. & Burl. R. Co., 27 Vt. 110; Alabama & Ten. R. Co. *v.* Kidd, 29 Ala. 221; Yarborough *v.* The Bank of England, 16 East, 6; Queen *v.* Birmingham & Glouc. R. Co., 3 Ad. & El. (N. S.) 223; Bloodgood *v.* M. & H. R. Co., 18 Wend. 9; Datter *v.* Troy T. & R. Co., 2 Hill, 629; Hale *v.* Union Mut. Fire Ins. Co., 32 N. H. 295.

Mr. Redfield observes: "As railways are, like other corporations, mere entities of the law, inappreciable to the senses, we do not see why this mere abstraction should not be regarded as always existing and present in the discharge of its functions. It is, indeed, a mere fiction, whether we regard the company as present or absent. And it seems more just and reasonable that this fiction should not be resorted to, to excuse just responsibility. It is certain we never require proof of any organic action of the corporation to constitute railway carriers of freight and passengers. All that is required to create the liability is the fact of their assuming such offices. So, too, for the most part, in regard to injuries to strangers and mere torts, it is not expected that proof will be given of any express authority to the servant or employee to do the particular act." 1 Redf. on Rail. 518. See, also, Lowell *v.* Boston & Low. R. Co., 23 Pick. 24.

[2] Ranger *v.* Great Western R. Co., 5 H. L. 72. See, also, Royal British Bk., *ex parte* Nicol, 28 L. J. Ch. 257; Green *v.* London General Omnibus Co., 7 C. B. (N. S.) 290; 29 L. J. C. P. 13; Green's Brice's Ultra Vires, 240.

A corporation is liable for even the willful acts of the servants, if done in relation to their legitimate duties. 1 Redf. on Rail. 508; Whiteman *v.* Wilmington & Susq. R. Co., 2 Harr. 514; Edwards *v.* Union Bk., 1 Fla. 136.

[3] Story on Agency, § 308; Paley on Agency, by Lloyd, 396; Chitty on Com. and Man. 214; Story on Bailm., § 400.

Mr. Story, "is not limited to principals who are mere private persons, but extends also to private corporations, for the misfeasances, negligences and omission of duty of their agents, in the course of their employment, whenever they are duly appointed."[1] Upon the same principle that private persons are liable for the wrongful acts of their servants and agents, so are private corporations, and for the same reasons, liable under the same circumstances as private persons.[2]

SEC. 317. **Corporations, when liable for torts.** — The liability of corporations for the tortious acts of its agents and servants is the same in all cases as though they were natural persons; and they are liable in the same manner and to the same extent.[3] Neither is the liability in such cases affected by the fact that the acts done are not within the legitimate powers of the corporation, if the acts are such as come within the scope of the powers attempted to be conferred upon the agents.[4] The doctrine of ultra vires, it is claimed, has no application in such cases, for in executing such acts the corporation is liable for the direct or consequential injuries which others may sustain for every grade and description of willful, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its legitimate powers the wrongful transaction or act may be.[5]

[1] Id. See, also, Yarborough v. Bank of England, 16 East, 6; Smith v. Birmingham Gas Co., 1 Ad. & El. 526; Salem Bank v. Gloucester Bank, 17 Mass. 1; Foster v. Essex Bank, id. 479; Fowle v. Common Council, etc., 3 Pet. 398.

[2] Stevens v. Boston, etc., R. Co., 1 Gray, 277; Blackstock v. N. Y., etc., R. Co., 1 Bosw. 77; Albert v. Savings Bank, 1 Md. Ch. 407; Thatcher v. Bank, 5 Sandf. 121; Thompson v. Bell, 10 Exch. 10; 26 Eng. L. & Eq. 536; Bargate v. Shortridge, 5 H. L. C. 297; 31 Eng. L. & Eq. 44.

[3] Id. See, also, Merchants' Bank v. State Bank, 10 Wall. 604. See as to their liability for libel, Whitfield v. South Eastern R. Co., 1 E. B. & E. 115; S. C., 4 Jur. (N. S.) 688.

[4] Booth v. Farmers & Mechanics' Bank, 50 N. Y. 396, where the court say: "The liability of the corporation for the consequences of acts of its officers, done within the scope of their general powers, is not affected by the fact that the act which the officer has assumed to do is one which the corporation itself could not rightfully do. A corporation may do wrong, through its agents, as well as a private individual."

[5] New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Philadelphia, etc., R. Co. v. Quigley, 21 How. 209; Life Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31; Bissell v. Michigan, etc., R. Co., 22 N. Y. 258; Frankfort Bank v. Johnson, 24 Me. 490; Thayer v. Boston, 19 Pick 511; Goodspeed v. East Haddam Bank, 22 Conn. 630.

A corporation may become responsible for the publication of a libel. Whitfield v. South Eastern R. Co., 1 E. B. & E. 115; 1 Redf. on Rail. 514.

SEC. 318. The general doctrine applicable to private corporations as well as to natural persons is thus stated by Mr. Story: "It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit,[1] for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, representations, torts, negligences and other malfeasances or misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.[2] In all such cases the rule applies, *respondeat superior;* for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents.[3]

In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." [4]

[1] Citing Attorney-General *v.* Siddon, 1 Tyrwh. 41; Rex *v.* Gutch, 1 Mood. & Malk. 437; Paley on Agency, by Lloyd, 294–298; id. 305, 306; 3 Chitty on Com. and Man. 209, 210; Smith on Merc. Law, B. 1, ch. 5, § 3, p. 130 (3d ed. 1843.)

[2] Citing Chitty on Com. and Man. 208–210; Paley on Agency, by Lloyd, 294–296, 301–307; Smith on Merc. Law, 70, 71 (2d ed.); id., B. 1, ch. 5, § 3, pp. 127–130, (3d ed., 1843); Story on Ag., §§ 130, 217, 308–310; Doe *v.* Martin, 4 Term R. 66, per Lord KENYON; Bush *v.* Steinman, 1 Bos. & Pull. 404; Attorney-General *v.* Siddon, 1 Tyrwh. 412; Story on Ag., §§ 311, 315–319; Milligan *v.* Wedge, 12 Ad. & Ell. 737, 742; Quarman *v.* Burnett, 6 Mees. & Wels. 499; Locke *v.* Stearns, 1 Metc. 560; Penn. Steam Nav. Co. *v.* Hungerford, 6 G. & J. 291.

[3] Citing Story on Ag., § 308; 1 Bl. Com. 431, 432; Abbott on Shipp., part 2, ch. 2, § 11; Ellis *v.* Turner, 8 Term R. 533; Bush *v.* Steinman, 1 Bos. & Pull. 404; Laugher *v.* Pointer, 5 Barn. & Cres. 546; Randleson *v.* Murray, 8 Ad. & Ell. 109; Milligan *v.* Wedge, 12 id. 737; Quarman *v.* Burnett, 6 M. & W. 499; Rapson *v.* Cubitt, 9 id. 710; Winterbottom *v.* Wright, 10 id. 109.

[4] Story on Agency, § 452, citing Lane *v.* Cotton, 12 Mod. R. 490; Paley on Ag., by Lloyd, 294, 301–307; 4 Bac. Abr., tit. Master and Servant, K.; Story on Ag., §§ 11–13, 315, 316, 319; Hern *v.* Nichols, 1 Salk. 289.

Mr. Justice BLACKSTONE, in his Commentaries, gives a different reason, and says: "We may observe that in all the cases here put the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment, by laying the blame on his agent. The reason of this is still uniform and the same — that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that

SEC 319. **They may do wrongful acts or direct them to be done.**—It is sometimes said that a corporation, being an invisible and artificial person, can execute directly no act, but for this purpose must employ agents. But, as we have seen, the directors at a lawful meeting may direct acts to be done, and they may be supposed to very closely represent, if they do not practically constitute, the corporate body itself. And if at such a meeting they should direct a wrongful and tortious act to be done, this would undoubtedly be considered the act of the corporate person, and would make the corporation liable, on the general principle that a party who directs an agent or any other person to commit a trespass or do any other wrongful act, is responsible to the party who suffers damage thereby, the same as though the act were done by the party himself.[1]

SEC. 320. **Frauds of corporations or their agents.**—A common cause of liability of corporations is the frauds of their agents. These consist, like those of natural individuals, of actual and constructive frauds. Fraud in law has been defined as any trick or artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he makes an agreement contrary to his interest. It may consist in misrepresentation or concealment of a material fact.[2]

Corporations are, like individuals, liable for frauds committed by their agents. An illustration of liability on the part of the corporation, by approval of fraudulent acts of agents, is found in the answer of Lord Chancellor WESTBURY to the question: "Under what circumstances can fraud be imputed to the corporation itself?" He says: "That if reports are made to the

no man shall be allowed to make any advantage of his own wrong." 1 Bl. Com. 432.

Mr. Story comments as follows on the above quotation from Blackstone's Commentaries: "It seems to me that the reason here given is artificial and unsatisfactory, and assumes as its basis a fact which is the reverse of the truth in many cases; for the master is liable for the wrong and negligence of his servant, just as much, when it has been done contrary to his orders and against his intent, as he is, when he has co-operated in, or known the wrong." Story on Ag., § 452, note.

[1] Glasgow v. Drew, 2 Macq. 103; Kerr on Fraud (Am. ed.), 117; Sharp v. Mayor, etc., 40 Barb. 273; 3 Keyes, 133; 40 N. Y. 454; Beach v. Fulton, 7 Cow. 485.

[2] Bouv. L. Dic.; Mansfield v. Watson, 2 Ia. 111.

shareholders of a company by their directors, and these reports are afterward industriously circulated, misrepresentations contained in those reports must undoubtedly be taken, after their adoption, to be the representations and statements made with the authority of the company, and therefore binding upon the company."[1]

And in an English case it has been held that the acts of the directors were the acts of the corporation. Lord ST. LEONARDS observed: "If representations are made by a company fraudulently, for the purpose of enhancing their stock, and they induce a third person to purchase stock, these representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, and although they may be representations made to the company, it is their own representation."[2]

[1] New Brunswick, etc., R. Co. *v.* Conybeare, 9 H. L. 725, Green's Brice's Ultra Vires, 244.

[2] National Exch. Co. *v.* Drew, 2 Macq. 103. See, also, *Re* National Patent Steam Fuel Co., *Ex parte* Worth, 4 Drew. 529; 28 L. J. Ch. 590; Nicol's Case, 28 L. J. Ch. 257; Kerr on Fraud (Am. ed.), 117.

Mr. Brice observes: "Frauds form the most important class of torts in connection with the liability of corporations, and they have given rise to many complicated and difficult questions. The requisites to support, at common law, an action for fraud are well known — first, defendant, *i. e.*, the party guilty of the fraud, which is oftenest a misrepresentation, and must be as to a matter of fact, must have committed the fraud knowingly, recklessly, or with negligence. (Taylor *v.* Ashton, 11 M. & W. 415.)

Secondly. He must have intended some other to act upon it. (Thom *v.* Bigland, 8 Ex. 725.)

Thirdly. The plaintiffs must have relied upon the fraud, dolus dans locum contractui (Attwood *v.* Small, 6 Cl. & F. 232), though it is sufficient if there was a fraudulent representation as to any part of that which induced him to enter into the contract. (Kennedy *v.* Panama Royal Mail Company, L. R., 2 Q. B. 580.)

Fourthly. The plaintiff must have sustained damage.

"These requisites should be carefully kept in mind when examining a case of fraud at common law whether it concerns a corporation or a private individual. But chancery proceeds upon somewhat different considerations, often holding that to be constructive fraud, which would afford no ground for an action at law, and very frequently granting to a suitor some redress when he would be utterly remediless at law, as by ordering the wrong-doer to recoup the plaintiff, as far as he (the wrong-doer) has benefited by the wrong. In considering the question of fraud, it will be convenient to take first, frauds and misrepresentations which can be imputed to corporations, directly and immediately, and secondly, those which can be imputed to them only indirectly and by implication

"Corporations are liable, like other individuals, for frauds committed directly by themselves or by their direction.

"Not a shadow of doubt now exists either at law or in chancery as to a corporation's liability, where the circumstances are such that the fraud can be imputed to the corporation itself. When will this be the case? The answer given by Lord Chancellor

SEC. 321. We have affirmed that the corporation, either by its direct action or through its agents, may be liable for wrongs done,

WESTBURY (9 H. L. 725) is: 'That if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterward industriously circulated, misrepresentation contained in those reports must, undoubtedly, be taken after their adoption, to be representations and statements made with the authority of the company, and, therefore, binding on the company.' Similarly in National Exchange Company of Glasgow *v.* Drew (2 Macq. 103), Lord ST. LEONARDS said 'I have certainly come to this conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, these representations, so made by them for that purpose, do bind the company.'

"I consider representations by the directors of a company as representations by the company, and although they may be representations made to the company, it is their own representation. This was explained or rather restated in a subsequent case (National Patent Steam Fuel Company, *Ex parte* Worth, 4 Drew, 529), by KINDERSLEY, V. C., thus: 'It was laid down in the National Exchange Company *v.* Drew (I do not say that the point was actually decided, but the opinion of some of the most eminent judges of the present day was expressed), that where there is a body like this, consisting of a great number of shareholders, and the directors make a report to the body at large, in performance of their duty, then, if such report contain a representation of the affairs of the company which is false, and if that is made to a public and general meeting of the shareholders of the company, and is adopted by the company as the report of the directors to that general meeting, although there be no order to publish it, either by the directors or the body at large, yet, from the very nature of the case, it must be regarded as the representation of the company.'

"As illustrating the liability at common law, may be mentioned Denton *v.* Great Northern Railway Company, 5 E. & B. 860. This was an action against the defendant for fraudulently publishing in their time-tables a train which had ceased to run, whereby the plaintiff, who had, relying on the tables, left London for Peterborough, with the intention of going on thence to Hull, by the train, which, on arriving at Peterborough, he learned had been discontinued, was put to expense, and it was unanimously held by the Queen's Bench that the defendants were liable for the expenses so incurred.

"These are such frauds as are committed by the agents of the corporation in the management and furtherance of its business. For these frauds it is now fully established at common law, that the corporation is liable, provided the agents guilty of the frauds kept within the limits of their authority. In Barwick *v.* English Joint Stock Bank (L. R., 2 Ex. 259), the court of exchequer chamber, on a bill of exceptions, held the defendants responsible for the fraud of their manager. No objection was taken — in fact the point was not even raised by either the counsel or the bench — to the action itself, as being against a corporation. It was assumed throughout that a corporation, like any other principal, is liable for the acts of its agents. So, in Kennedy *v.* Panama, etc., Mail Company (L. R., 2 Q. B. 580), which was an action brought on the ground of misrepresentation in a prospectus, issued by the directors, to recover calls paid by plaintiff, the same liability was assumed as beyond all argument. Indeed, the judgment of the court notices it only incidentally. These would not be legitimate consequences if there had been fraud in those acting for the company. Doubtless, in such a case, the company must bear all the consequences of the fraud of those they employ."

But the authorities and *dicta* in chancery are very conflicting, if not absolutely irreconcilable. On the one side it is urged that the agents of a corporation are its agents for carrying on its operations honestly and legally,

even where the acts constituting the wrong are ultra vires, the corporate authority.

and cease to be so when they act fraudulently and illegally. On the other side it is urged, with equal justice, that no distinction can be drawn between a principal, who is merely a legal entity, and an ordinary human being, and that as a corporation must act by agents, so, like other principals, it ought, in common fairness, to be responsible for the frauds as well as the other acts of these.

In support of the former view, we have the following:

North of England Joint-stock Banking Co., *ex parte* Bernard (5 D. G. & Sm. 283; Dodgson Case, 385), per PARKER, V. C.: "As to the argument that Mr. Bernard was induced to take these shares by incorrect representations, that point was taken in Dodgson's case, and KNIGHT BRUCE, V. C., said that "whatever fraud there might be, if fraud there was, it was charged against the directors, who could not be the agents of the body of shareholders to commit a fraud. For the same reason the motion must be refused."

Re Athenæum Life Assurance Co., *ex parte* Sheffield (28 L. J. Ch. 325), per PAIGE, WOOD, V. C., "With regard to any fraud in misrepresenting what the deed itself was, I apprehend nothing can be made of that; of course the representation made by the secretary could have no effect at all if the deed were different from what it was represented to be; for, though companies have been held to be bound, in some cases, by the act of all the directors acting in the due execution of their powers, it has never yet been held that an officer of a company misrepresenting the effect of a deed, it being no part of his functions to explain or expound that deed, could release a shareholder."

Duranty's Case (26 Beav. 268, 274), per ROMILLY, M. R., "The directors are not the agents of the company to commit a fraud."

Re Hull and London Life Assurance Co., *ex parte* Gibson (2 De G. & J. 275, 283), where Lord CHELMSFORD, L. C., expressed himself thus: "There is no doubt that if a person has been drawn in by the misrepresentation of an individual member of the company, he cannot exonerate himself from liability by reason of such false representation. If he has any remedy, it is against the individual shareholder who has deceived him. With respect to misrepresentation by the company itself, or its agents, the case would be different; but there has always appeared to me to be great difficulty in establishing such a case. The company is represented by its directors, who, for certain purposes, are its agents; but the difficulty is in saying that they are its agents for the purpose of making false representations."

In *Re* Royal British Bank, Mixer's Case (4 D. G. & J. 575, 586), Lord CAMPBELL, L. C.: "Clearly there was fraud and gross fraud on the part of the directors, and I have no doubt that he (*i. e.*, the appellant) was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors, which cannot be imputed to the company."

The above cases, however, cannot be considered binding at the present time, at least, not to the full extent of the language employed. It would, indeed, have been strange if that could have continued to be deemed fraud in a court of law, which chancery refused to recognize as such, and if a party injured by the misrepresentations of the agents of a company would have been compelled to apply to law for the relief and redress which equity denied him then. Three recent decisions of the supreme court of appeal have partially removed this anomaly, and have at length determined that a corporation cannot, in chancery, any more than at common law, shield itself from liability for the frauds of those it employs, by the absurd fiction that not possessing real existence, mental or bodily, the mental element intention, requisite to constitute fraud, is wanting.

In the first of these decisions, New Brunswick Railway Land Co. *v.* Conybeare (9 H. L. 725; L. J. Ch. 307), Lord CRANWORTH said: "If the directors, or the secretary acting for them, had fraudulently represented something to him (*i. e.*, the plaintiff) which was untrue, he then adhered to

In *Sharp* v. *Mayor, etc.*,[1] the court say: "The suggestion that a corporation cannot be liable for a fraud committed may be correct as to fraud not in any way connected with, or committed in the course of, and tending to carry out some power or act which it is authorized to perform. * * * The principal is liable for the false representations of the agent, made in and about the matter for which he was appointed agent, not on the ground of express authority given to the agent to make the statement, but on the ground that as to the particular matter for which the agent is appointed, he stands in the place of the principal, and whatever he does or says in and about the matter for which the agent is appointed is the act and declaration of the principal, for which the principal is just as liable as if he had personally done or made the declaration. The power of the agent to render the principal liable for representations, flows from his mere appointment to do the act or transact the business, in and about which the representations are made. * * *

Where a corporation has power to do some act, and as incident to that act, to render itself liable for representations made in and about the doing of that act, it can appoint an agent to do that act, and from the mere fact of such appointment the same powers will flow to the agent as if he had been appointed by an individual, provided only, that the powers so flowing could have been exercised by the corporation itself." And in general principles, a person who, by false and fraudulent representations and inducements held out to him by a corporation, has been deceived and misled into making a contract whereby he suffers loss, may

the opinion which he expressed on former cases, that the company would have been bound by that fraud."

In the Western Bank of Scotland *v.* Addie (L. R., 1 S. & D. 145), Lord CHELMSFORD laid down, that "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company, to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents."

In Oakes *v.* Turquand (L. R., 2 H. L. 325), the same judge quoted this last extract, and adhered to it as being a correct exposition of the liability of a corporation for the fraud of its agents. Brice's Ultra Vires (Eng. ed.), 226 *et seq.*

[1] 40 Barb. 273; 3 Keyes, 133; 40 N. Y. 454.

maintain an action against the corporation to rescind the contract.[1]

SEC. 322. **Frauds of agents for which the corporation is liable.** — It is affirmed as a general principle, that corporations are liable at common law for all damages sustained by others through the frauds and misrepresentations of their agents, which are perpetrated in the exercise of their employment, and within the scope of the authority conferred upon them. If the agents of the corporation, in the management of the business conferred upon it, are guilty of frauds, the corporation is liable for damages sustained by parties induced to deal with it in consequence thereof.[2]

[1] Henderson *v.* Railroad Co., 17 Tex. 560. See, also, Kennedy *v.* Panama etc., Mail Co., L. R., 2 Q. B. 580.

[2] Barwick *v.* English Joint-stock Bank, L. R., 2 Ex. 259; Swift *v.* Winterbotham, P. O., L. R., 8 Q. B. 244; Kennedy *v.* Panama, etc., Mail Co., L. R., 2 Q.B. 580, in which the court remarks: "These would not be legitimate consequences if there had been fraud in those acting for the company. Doubtless in such a case the company must bear all the consequences of the fraud of those they employ."

On this subject Mr. Brice says: "It must not here be forgotten that in determining whether a company can hold a shareholder to the contract into which by their own fraud they have induced him to enter, other equities have to be considered, and a totally different result will be arrived at than when we are examining whether that person will be liable to third parties, the creditors of the company, for its debts. Between the company and the person whom they have duped the subject is clear, if we put the question on the simple ground that no one can be allowed to retain that which he has acquired by fraud, but as regards third parties, such person is a *de facto* shareholder as long as he has not, from whatever cause, taken measures to denude himself of his shares, and it has been consequently decided that as such, as a member of the company, he is subject to the company liabilities. (Oakes *v.* Turquand, L. R., 2 H. L. 325; Peek *v.* Gurney, L. R., 13 Eq. 79; Pawle's Case, L. R., 4 Ch. 497.)

"Moreover, it is only the party originally defrauded, with perhaps exceptions arising in very special cases, who can repudiate the contract. For instance, a person who buys shares from one who could have repudiated these shares as having been issued to him under circumstances of fraud, cannot, on the ground of the original fraud, have such share canceled. (Duranty, 26 Beav. 268; Grisewood Case, 4 De G. & J. 544.) At common law an action of deceit may be brought at any time against a corporation as against a private individual, 'till the plaintiff's right is barred by the statute of limitations, but it is different when a shareholder seeks the relief of the court of chancery. A contract induced by fraud is voidable, not void, and the injured party will be deemed to have acquiesced unless he displayed ordinary precautions and care at the making of the contract, and has been prompt in appealing to the court on discovering the fraud. (Deposit and General Life Assurance Company *v.* Ayscough, 6 E. & B. 761; Clarke *v.* Dickson, 27 L. J., Q. B., 223; Scholey *v.* Central R. Co., L. R., 9 Eq. 266; Heymann *v.* European C. R. Co., L. R., 7 Eq. 154; 28 L. J., Ch. 257; *In re* Reese River S. M. Co.; Smith *v.* Reese, L. R., 2 Eq. 264; Central R. Co. *v.* Kisch, L. R., 2 H. L. 99.)

"We may thus summarize the authorities:

"I. At law:

"However the fraud be committed, if it can be imputed to the corporation, whether directly or indirectly, an action for fraud may be brought against

SEC. 323. If the constating instruments confer upon the board of directors all the powers of management and control of the corporate business, which would, without some special provision, vest in the corporate body, such board practically represents the corporation, and, as an agent of the corporation, its power is limited only by the powers conferred upon the corporate body. They are the managing officers and the only direct medium of communication between the corporation and other parties; and from their peculiar relations to the corporate body may, for all practical purposes, be treated as the body itself.[1] Hence, any fraud or material misrepresentations of the corporate business or the condition of the company, by them or by their authorized agents, by which third parties relying upon them sustain damage, would make the corporation liable for the loss sustained thereby, the same as though it were a private person.[2]

And a bank is liable for the fraud or mistakes of its clerks, cashiers or other officers, consisting of errors or false accounts in

the corporation for the damage thereby caused.

"II. In chancery:

"1. If the fraud be imputable to the corporation directly, that is, if it has been done or ratified by the shareholders in general meeting, then the corporation is liable for the consequences resulting therefrom.

"2. If it be imputable only indirectly, then the corporation can neither take advantage of the fraud nor retain, against the wish of the injured party, any benefits that may have accrued to it (the corporation) from such fraud. But the person aggrieved may, at his election, confirm or repudiate the transaction.

"3. It seems that the corporation cannot, by any proceedings in chancery, be rendered liable for damages resulting from fraud imputable to it indirectly.

"If the limitation last mentioned be correct, then it follows that in future corporations will not be liable at law for indirect fraud, since the supreme court of judicature act of 1873 expressly provides that where the rules of law and equity conflict, those of equity are to prevail. 36 and 37 Vict., c. 66, § 26, subd. 11, cited *ante*, p. 165.

"This result — the holding corporations not liable for the frauds of their agents, will cause a considerable qualification of the law as at present existing of principal and agent, and it will be a strange exemplification of the unexpected effects produced by sweeping legislative enactments passed without a due consideration of the matters affected thereby."

Brice's Ultra Vires (Eng. ed.), 238 *et seq.*

[1] Perkins *v.* New York, etc, R. Co., 24 N. Y. 213; Lee *v.* Village of Sandy Hill, 40 id. 451.

[2] Brokaw *v.* New Jersey, etc., R. Co., 3 Vroom, 331, where it was held that the corporation was liable for the frauds of the agent where he acted within the apparent scope of his authority. McClellan *v.* Scott, 9 Wis. 81, where it was held that the corporation was liable for misrepresentations of the agent as to the pecuniary condition of a railroad company.

Admissions and declarations of an agent of a corporation have the same effect, and are useful as evidence in the same way against the corporation, as though made by natural persons. Henderson *v.* Railroad Co., 17 Tex. 560.

the books of the corporation, made by them, or for refusing to allow a person entitled thereto to subscribe for or transfer stock.[1]

SEC. 324. **Particular acts of fraud by agents.** — Among the most common acts of fraud perpetrated by agents are those which consist of misrepresentations in soliciting subscriptions to the stock of the company, not only verbally made, but by means of circulars and other papers, which are not only extravagant, but false. But in such cases, in order to entitle a party to recover damages sustained thereby, or to set aside the contract, it must be made to appear that the party seeking to take advantage of such fraud used due diligence in the matter, and relied upon such false and fraudulent misrepresentations in making the contract, and that the misrepresentations related to matters materially affecting the value and success of the enterprise in which the corporation was engaged. And a mere commendation of the company or of its objects, or an expression of opinion as to its success, or of the dividends it would earn, would not be sufficient, either to base an action for damages or to set aside the contract on the ground of fraud.[2] And if the subscriber has, for a long time, acquiesced in his contract with the corporation, or if, by his laches, he has induced the belief that his subscription is genuine, and especially if the rights of creditors, or other persons acting *bona fide*, are involved and must be prejudiced if the subscription is not sustained, the subscriber will not be relieved.[3] And, under similar

[1] Union Bank *v.* McDonough, 5 La. 63; Ware *v.* Barataria Canal Co., 15 id. 169; Ang. & Am. on Corp., § 311.

[2] See, on these propositions, Hughes *v.* Antietam Manuf. Co., 34 Md. 316; Vawter *v.* Ohio, etc., R. Co., 14 Ind. 174; Johnson *v.* Crawfordsville, etc., R. Co., 11 id. 280; Brownlee *v.* Ohio, etc., R. Co., 18 id. 68; Carey *v* Cincinnati, etc., R. Co., 5 Ia. 357; Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575; Fogg *v.* Griffin, 2 Allen, 1; Litchfield Bank *v.* Peck, 29 Conn. 384; Kelsey *v.* Northern Light Oil Co., 54 Barb. 111; S. C., 45 N. Y. 505; Rives *v.* Montgomery, etc., R. Co., 30 Ala. 92; Henderson *v.* Railroad Co., 17 Tex. 560; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Wight *v.* Shelby, etc., R. Co., 16 B. Monr. 5; Nugent *v.* Cincinnati, etc., R. Co., 2 Dis. (O.) 302; Oregon, etc., R. Co. *v.* Scoggin, 3 Oreg. 161.

But it is not competent as evidence, to prove declarations made by the agent in his speeches and remarks in obtaining subscriptions, as to the location of the road, the subscription being unconditional. On the question of proper evidence in such cases, see Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Thigpen *v.* Mississippi, etc., R. Co., 32 Miss. 347; Vicksburgh, etc., R. Co. *v.* McKean, 12 La. Ann. 638; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Connecticut, etc. R., Co. *v.* Bailey, 24 Vt. 477; Kennebec, etc., R. Co. *v.* Waters, 34 Me. 369.

[3] Blodgett *v.* Morrill, 20 Vt. 509; Ogilvie *v.* Knox Ins. Co., 22 How. 380; Upton *v.* Hansbrough, 3 Biss. 417.

circumstances, a subscriber will not be relieved of his subscription on the ground of misrepresentations made by the agent, that he has authority to and will release the subscription, as it is unreasonable for the subscriber to presume that the agent has such authority.[1]

SEC. 325. **Doctrine, where the corporation is the occasion of a loss by the fraudulent act of a servant.** — The familiar maxim in equity, that where one of two innocent parties must suffer a loss by the acts of another person, he should bear the loss, who has enabled such person to occasion it, is as applicable to corporations as to natural persons. Thus, in the application of this maxim, corporations have been held responsible for the fraudulent acts of their officers in over-issuing stock; and, for the acts of cashiers and tellers, in falsely certifying checks, etc., as such agents and officers are, by the corporation, held out to the community as the proper parties to perform these acts and to furnish information in reference to such matters.[2]

Where a paying teller of a bank, on which a check was drawn, certified the same to be good, although his authority to certify in that way was limited to cases where the bank had funds of the drawer in hand sufficient to cover the check, it was held that a *bona fide* holder for value of such check could enforce payment of the same against the bank, although the drawer did not have such funds; and that this liability existed, even though the certificate by the teller was in violation of his duty, and for the mere accommodation of the drawer, and made upon his promise that it should never be presented for payment.[3] In the case above referred to, SELDEN, J., in the New York court of appeals, observes: "The act of certifying a check is simply answering the supposed inquiry, of one about to take the check, whether the bank has funds of the drawer to meet it; and no other officer or

[1] Custar v. Titusville Gas, etc., Co., 63 Pa. St. 381; Litchfield Bank v. Peck, 29 Conn. 384; Railroad Co. v. Rodrigues, 10 Rich. (S. C.) 278.

[2] Lickbarrow v. Mason, 2 T. R. 63; Merchants' Bank v. State Bank, 10 Wall. 604; Girard Bank v. Bank, etc., 39 Pa. St. 92; Rounds v. Smith, 42 Ill. 245; Bickford v. First National Bank, id. 238; Brown v. Leckie, 43 id. 497; Barnet v. Smith, 30 N. H. 256; Meads v. Merchants' Bank, 25 N. Y. 143; New York, etc., R. Co. v. Schuyler, 34 id. 30; Irving Bank v. Wetherald, 36 id. 335; Griswold v. Haven, 25 id. 596.

[3] Farmers and Mechanics' Bank v. Butchers and Drovers' Bank, 16 N. Y. 125; S. C., 28 N. Y. 425.

agent of the bank would seem to be so competent to give an answer as the paying teller. He is charged with all he pays out, and if he pays a check without funds in hand, he is responsible to the bank for the amount. His knowledge exceeds that of the book-keeper, because to the information obtained from the latter he adds a knowledge whether any deposits have been made or checks paid since the last entry in the books. No doubt the cashier, by virtue of his general powers, and his presumed knowledge of the affairs of the bank, would be competent to answer the question; but he could only do so by first inquiring of the bookkeeper and teller. Why should the applicant be compelled to seek the information through this circuitous channel, instead of going directly to the ultimate source of knowledge on the subject. The teller is put in the place of the cashier, to perform a portion of his duties. His appointment is virtually a division of the office of cashier; and that branch of the office which the teller fills embraces those duties which particularly require a knowledge of the state of the accounts of the depositors. Why then should he not be the organ of communication on that subject? * * * To certify a check when the bank has no funds to meet it, is to make a false representation; and neither the incidental power of the cashier, nor a general power conferred upon any other officer could be construed to authorize that. Hence, if a bank is holden, in any case, upon a certificate of its cashier that a check is good when it has no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized."[1]

SEC. 326. **Corporations enjoying the benefits of contracts secured through the frauds of agents will be responsible for such frauds.** — It is a general principle, applicable alike to corporations as to private persons, that the principal cannot enjoy the benefit of a contract

[1] See, also, Butler *v.* Watkins, 13 Wall. 456; North River Bank *v.* Aymar, 3 Hill. 262; Hern *v.* Nichols, 1 Salk. 289; in which case the agent was authorized to sell a quantity of silk, and had made certain fraudulent representations, by which the purchaser was deceived, it was held that the principal was liable, Lord HOLT observing: "Seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a confidence in a deceiver, should be a loser rather than a stranger."

secured by the fraudulent representations or acts of its agents without at the same time incurring the responsibility of such frauds. They cannot ratify and enjoy the fruits of a contract and avoid responsibility for fraudulent representations which induced the making of the contract by the other party. On this subject Mr. Story observes: "Where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully to all intents and purposes as if he had originally given him direct authority in the premises to the extent which such acts, doings or omissions reach." [1]

SEC. 327. The same doctrine has been held by the English courts. Thus, in the case of *The Western Bank of Scotland* v. *Addie*,[2] Lord CHELMSFORD said: "Where a person has been drawn into a contract to purchase shares belonging to a company by the fraudulent representations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agents." [3] But it has been held that stockholders, who have been induced to become such by fraudulent statements in relation to the condition of the company, must take the earliest opportunity after a discovery of the fraud to repudiate the contract, and they

[1] Story on Agency, § 239.

The maxim of the common law is, *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*. See, also, Concord Bank *v.* Gregg, 14 N. H. 331; Paley on Ag. by Lloyd, 324; Smith on Merc. L. 47; Odiorne *v.* Maxcy, 13 Mass. 178; Pratt *v.* Putnam, 13 id. 361; Fisher *v.* Willard, id. 379; Boynton *v.* Turner, id. 391; Copeland *v.* Merchants' Ins. Co., 6 Pick. 198; Conn *v.* Penn, 1 Pet. (C. C.) 496; Den *v.* Wright, id. 72; Breedlove *v.* Wamack, 2 Mart. (La., N S.) 181; Buchannan *v.* Upshaw, 1 How. 56; S. C., 17 Pet. 70; Crump *v.* United States Mining Co., 7 Gratt. 352; Hartshorn *v.* Day, 19 How. 211; Dorr *v.* Munsell, 13 Johns. 430; Champion *v.* White, 5 Cow. 509; Hazard *v.* Day, 18 Pick. {5; Dobson *v.* Pearce, 12 N. Y. 156; Depard *v.* Walbridge, 15 id. 374; Weed *v.* Chase, 55 Barb. 534; Marsh *v.* Falkner, 40 N. Y. 562; Craig *v.* Ward, 3 Keyes, 387; Lefler *v.* Field, 52 N. Y. 621; Dubois *v.* Hermance, 56 id. 673.

[2] L. R., 1 S. & D. 145.

[3] See, also, Oakes *v.* Turquand, L. R., 2 H. L. 325, 344; Barry Croskey, 2 J. & H. 1; Peek *v.* Gurney, L. R., 6 H. L. 377, 390.

cannot, as we have already noticed, unreasonably delay until the rights of creditors have supervened, and then if the corporate enterprise proves unsuccessful and losses must be sustained, avoid the contract of subscription so as to prejudice the rights of creditors, who had a right to rely upon the subscriptions. As between the corporation itself and the subscribers where no interests of third persons are concerned, the right to repudiate a subscription obtained by the fraud of the company is clear, but it may be quite different as to the rights of third parties.[1]

[1] Oakes *v.* Turquand, L. R., 2 H. L. 325; Peek *v.* Gurney, L. R., 13 Eq. 79; Upton *v.* Hansbrough, 3 Biss. 417; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Kelsey *v.* Northern Light Oil Co., 45 N. Y. 505; *Ex parte* Booker, 18 Ark. 338; Merchants' Bank *v.* State Bank, 10 Wall. 604; Butler *v.* Walkins, 13 id. 456. See, also, *ante,* § —; Deposit, etc., Assurance Co. *v.* Ayscough, 6 E. & B. 761; 26 L. J. Q. B. 29; Clarke *v.* Dickson, 27 id. 223; Scholey *v.* Central, etc., R. Co., L. R., 9 Eq. 266; Heymann *v.* European, etc., R. Co., L. R., 7 Eq. 154.

On this subject Mr. Brice observes: "In Barwick *v.* The English Joint-stock Bank (L. R., 2 Ex. 259), the Exchequer Chamber held unanimously and in the most unqualified manner that an action for fraud lies against a corporation as against any private individual, whether the fraud be that of the principal directly or of the agents employed, provided only that the latter are acting within the ordinary scope of their occupation. But in Western Bank of Scotland *v.* Addie (L. R., 2 H. L. 325), the Lord-Chancellor said: 'But if the person, who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.' To the same effect was the decision of Lord CRANWORTH (L. R., 1 S. & D. 167; 1 J. & H. 1; Peek *v.* Gurney, L. R., 6 H. L. 370). An attentive consideration of the case has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds, but that they cannot be sued as wrongdoers, by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, where the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally.'

"Most of the cases, however, which have come before courts of equity, have arisen from the attempts of persons who, induced by flowery prospectuses and glowing reports, have taken shares, to get themselves relieved from their responsibilities upon the statements put forth, and relied on by them turning out incorrect. In all such cases, if the fraud be imputable to the corporation and the injured party has not debarred himself by laches, relief will be granted.

"Conybeare *v.* New Brunswick, etc., Land Company (9 H. L. 711; 31 L. J. Ch. 297; 1 Dr. & M. 363; L.R., 3 Ch. 682), is a leading authority. Here the house of lords, reversing the decision of the Lords Justices, decided that the plaintiff was not entitled to have his name removed from the list of shareholders, on the grounds, first, that there had not been any concealment, inasmuch as an act of parliament, the absence of which from a certain report published by the company was the concealment alleged, was recited on the articles of association, which he (plaintiff) must be held to have perused, and secondly, that the misrepresentation complained of, thus stated in the bill: 'The said report of July, 1858, referred to the lands of the said company in terms calcu-

The doctrine universally recognized in such cases is, that the contract is voidable only, and hence the party entitled to avoid it must be prompt in the exercise of his right in this respect; and he cannot by his delay induce innocent third parties to suppose the contract a binding one, and entice them into contracts on the strength of such subscriptions, and afterward take advantage of it to the prejudice of creditors or other third parties.

lated to convey to the mind an impression that such lands were the absolute and indefeasible property of the company,' was not a representation but an inference that was left to be drawn from the expressions used in the report. Their Lordships, however, threw in doubt the liability of a corporation for frauds which can be imputed to itself directly. The general tenor of their judgments is well expressed in the foot note on the House of Lords Reports, viz.: 'If reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders and afterward industriously circulated, representations contained in those reports must be taken to be representations made with the authority of the company, and, therefore, binding the company; and if those reports having been industriously circulated be clearly shown to have been the proximate and immediate cause of shares having been bought from the company, the company cannot be permitted to retain the benefit of the contract, and keep the purchase-money that has been paid. Representations made by the secretary to a person in a general conversation, without a view to any definite statement by that person that he wants to purchase shares, are not binding on the company.'

"Another very recent case is that of Central Railway Company of Venezuela Limited *v.* Kisch (L. R., 2 H. L. 99). The defendant, the original plaintiff, filed a bill to have his name removed from the list of shareholders in the railway and to have the payments he had made on account of calls returned him. He had taken the shares on the faith of a prospectus which referred to a concession made by the Venezuelan government to the company for making a railway, and stated that the contractor had guaranteed a dividend of 2½ per cent on the paid-up capital, during the construction of the works, while, in fact, this guarantee was limited £20,000, and that the contract had been entered into 'at a price considerably within the available capital,' when in reality — on account of the company having paid £50,000 for the concession, which payment was not mentioned in the prospectus, and which concealment the defendant alleged as a ground of complaint, it left but a margin of £30,000 out of £50,000. On these grounds of misrepresentation and concealment, and more especially of the latter, the House of Lords granted the relief prayed.

"So, in many other cases, shareholders have been relieved of their shares on the ground that they were induced to take them by misrepresentation, the false statements being on one occasion with respect to the capital subscribed or shares taken (Ross *v.* Estates Investment Company, (L. R., 3 Ch. 682; L. R., 5 Eq. 249), upon another, as to the nature of the business to be undertaken (Blackburn's Case, 3 Drew. 409), or as to the value. (Reese River Mining Co. *v.* Smith, L. R., 4 H. L. 64; Denton *v.* Macneil, L. R., 2 Eq. 352), or locality (Lawrence Case, L. R., 2 Ch. 412; L. R., 1 Ch. 575), of property already or to be thereafter acquired by the company. In a word, misleading facts of any description, material to the contract to take shares, and actually the inducement to such contract, render such contract voidable on the part of the person so induced to enter into the same, always providing that the misleading facts in question were promulgated by the company itself or its duly authorized agents. (Frowd case, 30 L. J. Ch. 322; Burnes *v.* Penne, 2 H. L. 497.)" Green's Brice's Ultra Vires, 255–8.

SEC. 328. **Right to repudiate a contract for fraud limited to original parties.**—The right to repudiate a contract for stock on the ground of fraud is limited to the party contracting for the same with the company. But if such holder of stock, even where the subscription has been obtained by fraud of the corporation, and where for such fraud the subscriber might have the contract set aside, still, if he transfers such stock to another, the purchaser cannot, as such stockholder, set aside the original contract on the ground of the fraud.[1]

But it may be observed that a right of action, even for a tort, may now, under the provisions of the statutes of many, if not most of the states, be assigned so as to entitle the assignee to maintain an action in his own name for the damages sustained by the assignor thereby.

SEC. 329. **Ratification of the contract effected by the fraud of the agent.**—We have had occasion to notice the effect of the ratification of contracts made by agents in the name of the corporation, where they exceed the authority conferred upon them;[2] and the same general principles are applicable, not only where the ratification is of unauthorized contracts but also of unauthorized torts. "In all cases," observes Mr. Story, "if the principal subsequently ratifies the act he is bound by it, whether it be for his detriment or for his advantage; and whether it be founded upon tort or upon a contract. And a ratification once deliberately made, with full knowledge of all the material circumstances, cannot be recalled."[3] But in case of ratification, as before observed,[4] it cannot be of a part of the unauthorized or tortious act. If the principal adopts it he must adopt the whole or none. And if he ratifies at all, it operates as a ratification of the whole. But this rule, in reference to torts in particular, must be received with the qualification that the ratification is made with a full knowledge of the facts and all

[1] Duranty's Case, 26 Beav. 268; Griswold's Case, 4 De G. & J. 544; Peek *v.* Gurney, L. R., 13 Eq. 79; Cross *v.* Sackett, 2 Bosw. 617.

[2] Story on Agency, § 242. See, also, Lucena *v.* Crawfurd, 5 B. & P. 269; Routh *v.* Thompson, 13 East, 274; Paley on Ag., by Lloyd, 112–115, 171, 172, 324, and note; Wilson *v.* Poulter, 2 Str. 859; Taylor *v.* Plumer, 3 M. & S. 562; 1 Liv. on Ag. 44–52; Rogers *v.* Kneeland, 10 Wend. 218; Lench *v.* Lench, 10 Ves. 517; Kelley *v.* Munson, 7 Mass. 319.

[3] Story on Agency, § 250 and notes.

[4] See *ante*, § 207. See, also, Story on Agency, § 258 *et seq.*

the material circumstances relating to it; in which case it becomes *eo instanti*, obligatory upon the principal, and cannot afterward be revoked.[1]

SEC. 330. In cases of contracts secured by the fraud of corporate agents, if, after knowledge of the fraud, the corporation still insists upon the benefit of the contract thus secured, it is evident that it would be liable not only for damages thereby sustained, but that the other party might have the contract set aside and canceled, for that reason. We have already considered, in treating of agents, the acts and circumstances which would be evidence of ratification.[2] And we have also considered the personal liability of corporate agents in cases where they exceed their authority in making contracts, and also in cases of torts not only to the corporation but to parties injured thereby.[3]

SEC. 331. **Corporate liability for other wrongs.** — Having considered the liability of corporations for the frauds of itself and its agents, we will now proceed to consider its liability for other torts. In this respect it may be affirmed that a corporation will be liable in all cases for torts committed, by its direction or approval, the same as a natural person. It will be liable for the tortious acts of its servants or agents committed while engaged in the course of his duties, and within the scope of the authority conferred upon them, either express or implied, and whether such acts come within the designation of forcible, negligent, malicious, or fraudulent torts.[4]

[1] See *ante*, § 210.

[2] See *ante*, § 207. See, also, Story on Agency, § 253 *et seq.*

[3] See *ante*, § 210.

[4] State *v.* Morris, etc., R. Co., 3 Zabr. 367; Brokaw *v.* New Jersey, etc., R. Co., 3 Vroom, 328; Albert *v.* Savings Bank, 1 Md. Ch. 407; Thatcher *v.* Bk., 5 Sandf. 121; Thompson *v.* Bell, 10 Exch. 10; 26 L. & Eq. 536; Bargate *v.* Shortridge, 5 H. L. Cas. 297; 31 E. L. & Eq. 44; National Exchange Co. *v.* Drew, 32 Eng. L. & Eq. 1; Stevens *v.* Boston R. Co., 1 Gray, 277; Blackstock *v.* New York, etc., R. Co., 1 Bosw. 77.

As to liability of municipal corporations for injuries resulting from a want of skill of its agents, in constructing public works, see City of Dayton *v.* Pease, 4 Ohio (N. S.), 80.

On the subject of liability of a corporation for fraud, negligence, or mistakes of agents, see Salem Bk. *v.* Gloucester Bank, 17 Mass. 1; Gloucester Bank *v.* Salem Bank, id. 33; Manhattan Co. *v.* Lydig, 4 Johns. 377; Bank of Ky. *v.* Schuylkill Bank, 1 Pars. Sel. Cas. 248; Ware *v.* Barataria Canal Co., 15 La. 168; Union Bank *v.* McDonough, 5 id. 63; Johnson *v.* South Western R. Bank, 3 Strobh. Eq. 263;

SEC. 332. **Assault and battery when committed in the line of duty of the agent.** — We have affirmed the proposition generally, that

Crump *v.* U. S. Min. Co., 7 Gratt. 352; Commercial Bank *v.* Union Bank, 1 Kern. 203; Beers *v.* Housatonic R. Co., 19 Conn. 566; Bradley *v.* Boston R. Co., 2 Cush. 539; Baltimore R. Co. *v.* Woodruff, 4 Md. 242; Sharrod *v.* London R. Co., 4 Exch. 585; Gillenwater *v.* Madison R. Co., 5 Ind. 339; Marlatt *v.* Levee Steamboat Cotton Co., 10 La. 583; Memphis *v.* Lasser, 9 Humph. 757; Green *v.* London Gen. Omnibus Co., 7 C. B. (N. S.) 290.

Mr. Brice, on this subject, has referred to many English authorities, some of which would hardly be considered good in this country. He observes:

"What has been said with regard to fraud will apply with proper qualifications to other torts. Corporations are not created — it is no part of their business — to commit torts. Nevertheless, courts of law have decided that they must be held liable for torts committed by their agents and servants acting within their authority, upon the same principles and by precisely analogous reasoning as they have been made responsible for fraud. Thus, an action for trespass to the person, (Seymour *v.* Greenwood, 7 H. & N. 355; 30 L. J. Ex. 327; Limpus *v.* London General Omnibus Company, 1 H. & C. 526; Goff *v.* Great Northerly R'y Co., 30 L. J. Q. B. 148), or the property, *e. g.*, trover (Tatten *v.* Great Western Railway Company, 29 L. J. Q. B. 184; Mears *v.* London and South Western Railway Company, 11 C. B. [N. S.] 850; 31 L. J. C. P. 220), will lie against a corporation, as against an individual. The agent of the corporation must, of course, be acting within his authority, and upon this point difficult questions arise as to the extent of the agent's authority, and more especially of his implied authority. In Edwards *v.* London and North Western Railway Company, L. R., 5 C. P. 445, it was decided that a fireman porter in the service of a railway company who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property, and consequently that if he gives in charge, on such suspicion, an innocent person, the company are not liable.

"In Allen *v.* London and South Western Railway Company, L. R., 6 Q. B. 65, a similar decision was come to with regard to the arrest, by direction of a ticket distributor, of an innocent person whom he had suspected wrongly of an attempt to rob the till. The jury found that the ticket distributor acted in defense of the company's property, but the court unanimously held, that he had no implied authority from the company to order the arrest, and that consequently the company were not liable for the same. In this case, as in the former, the court thought that the respective officials concerned, had an implied authority to take such proceedings only as were imperatively demanded for the immediate protection of the property under their charge; and that the moment any attempt to injure or steal such property was abandoned, this implication ended any steps they might then direct, not being called for, for such protection would be of their own motion and at their own peril. *Lex ita scripta.*

"What a corporation cannot do, its agent cannot do so as to bind it. From this it necessarily follows that there can be no authority to an agent, implied or otherwise, to take proceedings which would be ultra vires of the corporation; and that the corporation cannot, in any way, be rendered amenable for torts committed by one of their servants in the course of such proceedings. This is well shown by the case of Poulton *v.* London & South Western Railway Company (L. R., 2 Q. B. 534). The facts were these, the plaintiff, who had taken a horse to an agricultural show by the defendant's railway, was entitled, under arrangements advertised by the defendants, to take the horse back free of charge on the production of a certificate. The plaintiff, accordingly, produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff, having taken a ticket for himself, proceeded by the same train. At the end of the journey the station-master demanded payment for the horse, and the plaintiff, refusing to

the principal is responsible for all positive misconduct, or for any neglect or omission of agents done or committed while acting

pay, was detained in custody by two policemen under the orders of the station-master, until it was ascertained by telegraph that all was right. An action having been brought by the plaintiff against the defendants for false imprisonment, it was held, that though a railway company has power to apprehend a person traveling on the railway without having paid his own fare, it can only detain the goods for non-payment of the carriage, that as the defendants themselves would have had no power to detain the plaintiff, on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station-master to detain the plaintiff on this assumption, and that they were, therefore, not liable for this act of the station-master.

"This case decides only that no implied authority as to detention belonged to the station-master. Of course, he might have had express authority to act as he did, and though such authority would have been ultra vires of the company purporting to confer it, yet they would have been responsible for the result thereof. Herein consists a great distinction between tortious and contractual liability for acts ultra vires. It is no defense to legal proceedings in tort that the torts were ultra vires. If the torts have been done by the corporation, or by their direction, they are liable for the results however much in excess of their powers such torts may be.

"Other torts there are with respect to which the liability of a corporation may be fairly considered doubtful. Ordinarily it is sufficient to render a person responsible for a tort, whether committed by himself or his agent, if only there has been negligence, heedlessness or rashness. Sometimes, however, the mental ingredient becomes intention, actual or constructive. Can a corporation be made amenable for those torts, which require, on the part of the wrong-doer, knowledge or willfulness?

"In Stiles *v.* Cardiff Steam Navigation Company (4 N. R. 483; 33 L. J. Q. B. 310), it was determined that a corporation would be liable for knowingly keeping a mischievous animal. Mr. Justice SHEE asserted broadly in reference to the *scienter*, that 'corporations are, in this respect, in no different position from private owners, and if it could be shown that the mischievous propensity of the dog was known to any person having control of the business or of the yard, or even the dog, or whose duty it would be to inform the company of what the dog had done, it might do, but the evidence fails on that point.'

"In Whitfield *v.* South Eastern Railway Company (1 E. B. & E. 115; 27 L. J. Q. B. 229) (see Lawless *v.* Anglo-Egytian Cotton & Oil Company, L. R., 4 Q. B. 262), it was held that a corporation was liable for publishing a libel contained in a telegram which passed over their wires; and *e converso*, a corporation, though intangible and without personal incidents, may sue for libel upon it. Metropolitan Saloon Omnibus Company *v.* Hawkins, 4 H. & N. 87; 28 L. J. Ex. 201.

"In respect of liability for torts it makes no difference whether the corporation is a trading one making profits out of its undertaking, or exists merely for public purposes. In the latter case, as on the former, it is equally under obligations to all persons with whom it may come into contact, and is bound so to carry on its affairs as to keep within its powers, and not to cause injury to others, failing this, it is liable for the damage resulting. (Southampton & Itchin B. C. *v.* Local Board of Southhampton, 8 E. & B. 801; 28 L. J. Q. B. 41; Ruck *v.* Williams, 3 H. & N. 308; Brownlow *v.* Metropolitan Board, 16 C. B. [N. S.] 546.)

"Under the same circumstances the various boards of commissioners, and other similar bodies appointed to conduct and carry out public improvements, and deriving therefrom no personal advantage whatever, will, in their corporate or quasi-corporate capacity, unless expressly by statutory provision relieved, be responsible to the parties injured. (See the cases cited above, and also the Mersey Docks Trustee *v.* Gibbs, L. R., 1 H. L. 93.)

"The liability of corporations has

within the scope of the authority conferred upon them. But it is sometimes a matter of difficulty to determine the extent of the agent's authority, and whether, in the particular acts claimed to be tortious, the agent was acting within the scope of his authority. For instance, while thus acting, the agent may commit an assault and battery. If the agent should, for the time being, leave the business of his agency, and willfully and maliciously commit an assault and battery, the principal evidently would not be liable.[1]

But if, in the performance of and within the scope of his supposed duty, he inflicts an unwarranted injury upon another, the principal would undoubtedly be liable therefor. Thus, if a brakeman or other agent of a railroad company should leave his employment, and without any connection with his duties as such should commit an assault and battery upon another, it is evident that the railroad company would not be responsible for the dam-

been extended to even some varieties of crimes. The notion of crime, as usually held, requires intent on the part of the criminal, but this is not the view taken by our law. Many acts, which, if productive of harm to a single persons, are mere torts, become crimes when they result in damage to a large number of people, and all proceedings, which are invasions of the rights or privileges not of some individual specially, but of the public at large, or which are detrimental to the genral well-being or to the interest of the state, similarly fall under the category of crimes. In such cases the intent is notional and constructive, rather than real (Reg. *v.* Stephens, L. R., 1 Q. B. 702); it suffices if the wrong-doer has caused, whether directly by his own proceedings or indirectly by those of his agents, the wrong in question. Manifestly a corporation can commit such wrongs, can have such an intent, and by consequence at least to such extent render itself amenable to the criminal law.

"Accordingly it has been decided that a corporation may be indicted for misdemeanors which are in reality public torts, *e. g.*, for disobedience to an order of justices requiring them to execute works pursuent to a statute (Reg. *v.* Birmingham and Gloucester Railway Company, 3 Q. B. 223), for malfeasance in cutting through and obstructing a public highway (Reg. *v.* Great North of England Railway Company, 9 Q. B. 315; Reg. *v.* Longton Gas Company, 2 E. & E. 651; Reg. *v.* United Kingdom Electric Telegraph Co., 2 B. & S. 647, *n.;* 3 F. & F. 73); for nonrepair of a highway, and the like. Reg. *v.* Mayor, etc., of Manchester, 7 E. & B. 453; 26 L. J. (Mc.) 65.

"The authorities hitherto have gone only so far as to render them liable criminally for a nonfeasance or misfeasance, where the mental element is negligence. Whether this can ever be extended to felonies or misdemeanors, the essence of which is malice, willfulness, or other such determinate fact, is very doubtful. Reg. *v.* Great North of England Railway Company, 9 Q. B. 315; King of the Two Sicilies *v.* Willcox, 1 Sim. (N. S.) 334; 19 L. J. Ch. 488.

"Being mere abstractions, they cannot have actually the mental element therein involved, and to raise it by implication is directly opposed to every principle of criminal law." Brice's Ultra Vires (Eng. ed.), 244 *et seq.*

[1] See Edwards *v.* London, etc., R. Co., L. R., 5 C. P. 445; L. R., 6 Q. B. 65; Owsley *v.* Montgomery R. Co., 37 Ala. (N. S.) 560.

ages sustained thereby; but, if such agent, while acting for such company, and within the line and apparent scope of his duty, should, though without authority of the company, unlawfully assault and beat a passenger, the company would be responsible for the damages sustained by such passenger.[1]

SEC. 333. A distinction has been made as to the liability of the principal between acts that are tortious, if done in the execu tion of acts which are ultra vires, and mere contracts, in case they are ultra vires. In the former case, it has been held that corporations are liable if the act through ultra vires, is done by its direction, whereas in the latter it would not generally be liable.[2]

SEC. 334. **Liability of corporations for trespasses to property.**—The liability of a corporation for an injury to the real or personal property of another is the same as in case of a natural person. The only distinction between them being, not in the injury or liability itself, but in the fact that, as a corporation is merely an imaginary person, its trespasses must necessarily be committed through its agents, while a natural person may commit them not only by his agents, but by his own direct act. Wherever an injury may be done through the agent, and an action therefor sustained against an individual principal, under like circumstances an action will lie against a corporation.

Thus, a corporation may be liable in trover or for the conver-

[1] Philadelphia, etc., R. Co. *v.* Derby, 14 How. 468; Jackson *v.* Second Av. R. Co., 47 N. Y. 274; Hamilton *v.* Third Av. R. Co., 35 N. Y. Superior Ct. R. 118; S. C., 53 N. Y. 25; Moore *v.* Fitchburg R. Co. 4 Gray 465; Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117; Coleman *v.* New York, etc., R. Co., 106 id. 160; Crocker *v.* New London, etc., R. Co., 24 Conn. 249; Brockaw *v.* New Jersey, etc., R. Co., 3 Vroom, 328; Philadelphia, etc., R. Co. *v.* Wilt, 4 Whart. 143; Pennsylvania, etc., R. Co. *v.* Vandiver, 42 Pa. St. 365; Chicago & N. W. R. Co. *v.* Williams, 55 Ill. 185; Kline *v.* Central, etc., R. Co., 39 Cal. 587; Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70; Jeffersonville R. Co. *v.* Rogers, 38 id. 116.

As to injury resulting from negligence causing death, see Shearm. & Redf. on Neg., ch. 17, 27, 33. As to the measure of damages in such cases, see Field on Dam., ch. 21, § 626 *et seq.*

As to the general liability in cases of trespass to the person, see, also, the English cases, Seymour *v.* Greenwood, 7 H. & N. 355: 30 L. J. Ex. 327; Limpus *v.* London Gen. Omnibus Co., 1 H. & C. 526; 32 L. J. Ex. 34; Goff *v.* Northern R. Co., 30 L. J. Q. B. 148.

[2] See *ante*, ch. 9; Sharp *v.* Mayor, 40 Barb. 273; 3 Keyes, 133; 40 N. Y. 454; Beach *v.* Fulton Bank, 7 Cow. 485; Bank of U. S. *v.* Davis, 2 Hill, 451.

sion of personal property;[1] for trespass, in stopping water-courses; or for injury to property by the construction and use of canals; by blasting rocks; entering upon the premises of another and carrying away the soil, or cutting timber; for nuisance; for ejectment; and for negligence causing damage to person or property. And in all these cases corporations will be liable to damages for the injury sustained, where the acts are committed by their agents, acting within the scope of their authority, the same as though the actions therefor were against individuals.[2] So, an action may be maintained against a corporation for a libel;[3] and for false imprisonment;[4] for a nuisance, for which a corporation may also be indicted;[5] and, also, for a malicious prosecution.[6]

SEC. 335. In a recent case against a railway corporation for a malicious prosecution, the court say: "It must appear that the prosecution was instituted maliciously and without probable cause. In a legal sense, any act done willfully and to the injury of another, which is unlawful, is, as against that person, malicious, and it is not necessary that the perpetrator of such act should be influenced by ill-will toward the individual, or that he entertain or pursue any bad purpose or design. The proof of malice need not be direct. It may be inferred by the jury from the want of

[1] Tattan v. Great Western R. Co., 29 L. J. Q. B. 184; Mears v. London, etc., R. Co., 11 C. B. (N. S.) 850; 31 L. J. C. P. 220; Yarborough v. Bank of England, 16 East, 6; Duncan v. Surrey Canal Co., 3 Stark. 50; Smith v. Birmingham Canal Co., 1 A. & E. 526; Baltimore v. Norman, 4 Md. 352; Ang. & Am. on Corp., § 384; Green's Brice's Ultra Vires, 262; Brown v. South Kennebec Ag. Soc., 47 Me. 275.

[2] Trespass will lie against a corporation. See Hay v. Cohoes Co., 2 Comst. 159; 3 Barb. 42; Carman v. Steubenville R. Co., 4 Ohio St. 399; Barnard v. Stevens, 2 Aikins (Vt.), 429; Underwood v. Newport Lyceum, 5 B Monr. 130; Humes v. Knoxville, 1 Humph. 403; Crawfordsville R. Co. v. Wright, 5 Ind. 252; Hazen v. Boston R. Co., 2 Gray, 574; Chicago R. Co. v. Fell, 22 Ill. 333; Same v. Whipple, id. 105; Illinois C. R. Co. v. Reedy, 17 id. 580; Edwards v. Union Bank, 1 Fla. 136; Whiteman v. Wilmington R. Co., 2 Harr. 514; Bloodgood v. Mohawk R. Co., 18 Wend. 9. See, also, Lyman v. Bridge Co., 2 Aik. (Vt.) 255; Watson v. Bennett, 12 Barb. 196; Lee v. Sandy Hill, 40 N. Y. 442; Chestnut Hill Co. v. Rutter, 4 S. & R. 6; Delaware Canal Co. v. Commissioners, 60 Pa. St. 367; Whiteman v. Wilmington, etc., R. Co., 2 Harr. 514; Humes v. Knoxville, 1 Humph. 403; Terre Haute Gas Co. v. Teel, 20 Ind. 131.

[3] Philadelphia R. Co. v. Quigley, 21 How. 202; Whitfield v. South Eastern R. Co., E. B. & E. 115; Lawless v. Anglo-Egyptian Co., L. R., 4 Q. B. 262; Western Bank, etc., v. Addie, 1 H. L. Sc. 145.

[4] Goff v. Great Northern R. Co., 3 E. & E. 672.

[5] Delaware Canal Co. v. The Commonwealth, 60 Pa. St. 367.

[6] Vance v. Erie R. Co., 3 Vroom, 334. See, also, Gillett v. Missouri, etc., R. Co., 55 Mo. 315.

probable cause, and involves nothing more than a wrongful act intentionally done. To hold a corporation amenable in this particular action is strictly in accordance with well-settled legal principles. The wrong for which the action is the appropriate remedy is susceptible of being committed by a corporation by means of its agents and servants. No technical difficulties are in the way of the institution of the suit, and, at the trial, the cause can be conducted upon the established rules of evidence. To afford redress against a corporation for other intentional wrongs done by them, and deny it in this case, is an anomaly which can only be justified because of the interposition of insurmountable obstacles. No such obstacles stand in the way of the prosecution or maintenance of the action."[1] The liability in such a case must come within the rule, that the corporation has directly authorized it, or the wrong must be done and performed within the scope of the authority conferred upon the agent, as we have already noticed, or the corporation would not be liable.

SEC. 336. **Liability of corporations in case of the negligence of agents.** — Corporations, like natural persons, are liable for the negligence of their officers, agents and servants, while engaged in the business of the corporation, by which others sustain a loss. The general doctrine in reference to negligence is, "that for all injuries to a person, resulting from the negligence of another, and to which the party injured has not, by his own act or negligence, materially contributed, the injured party may recover all such damages as directly and naturally, or necessarily flow from the negligence."[2] Although the general doctrine is that the principal is not liable for the willful and malicious torts of his agents, still, corporations have frequently been made responsible, where it would

[1] Opinion of DEPUE, J., in Vance *v.* Erie R. Co., *supra*. See, also, Stevens *v.* Midland R. Co., 10 Exch. 352; Merill *v.* Tariff Manuf. Co., 10 Conn. 384; Jeffersonville R. Co. *v.* Rogers, 28 Ind. 1.

[2] Field on Dam., § 660. See, also, Hill. on Torts, 115 *et seq.*; Shearm. & Redf. on Neg., § 594; Bridge *v.* Grand Junction R. Co., 3 M. & W. 244; Ellis *v.* London, etc., R. Co., 2 H. & N. 424; 26 L. J. Exch. 549; Thompson *v.* N. W. R. Co., 2 B. & S. 106; 3 L. J. Q. B. 67; 2 B. & S. 119.

"A negligence is the juridical cause of an injury, when it consists of such an act or omission on the part of a responsible human being [or a corporation], as in ordinary natural sequence immediately results in such injury. Such in fact we may regard as the meaning of the term 'proximate cause,' adopted by Lord BACON, in his maxims." Whart. on Neg., § 73.

appear that the acts were willful and malicious, on the ground that the corporation has been negligent in selecting or continuing such agent, knowing his habits or incompetence, or in subsequently either directly or indirectly approving of, or indorsing his conduct, which is the basis for the damages claimed. If the corporation, by its acts, holds out an agent as competent and worthy of confidence, in the performance of the duties to which he is intrusted, and as fit to be trusted, it has been held that it thereby warrants his fidelity, competency, and good conduct, in all matters within the scope of his agency.[1] And as a general rule it will not be permitted to set up, in defense of an action for negligence, the intentional violation of duty on the part of an agent to whom it has intrusted the performance of duties, if done within the scope of his general authority; and this rule might well rest upon the familiar equitable doctrine, that where one of two parties must suffer for a loss sustained, he should sustain the loss, who, by his conduct, has created a confidence which produced or resulted in an injury or loss.

SEC. 337. **Limitation of liability in case of negligence.** — There is, however, a familiar maxim of the law that a party guilty of a negligence, by which loss is sustained, shall only be liable for the proximate consequences of his wrongful act, *causa proxima et non remota spectatur*. But this maxim affords an imperfect guide in determining the near or even remote consequences of a wrongful act, for which the wrong-doer should respond in damages. It is, perhaps, impossible to frame any rule of universal application in cases of negligence, to determine the question of liability on the ground of such negligence as the proximate cause.[2]

The question of liability for losses more or less remote has been illustrated as follows: "Suppose through the negligence of a railroad company the house of A, near a railroad, is set on fire without his fault, by sparks and cinders escaping from the locomotive used by the company, and is consumed, and that the adjoining buildings of B, C and D are thereby, and without their

[1] See *ante*, §§ 189, 252.

[2] Field on Dam., §§ 10, 48 *et seq.*; 664 *et seq.*

fault, successively consumed, is the company liable to B, C and D, respectively? On this question the authorities seem very conflicting. * * * Thus, it has been held, that where, through the defective condition of a locomotive of the defendant, a railroad company, a quantity of wood was ignited in one of its sheds, and the shed was consumed, and the fire therefrom set on fire and consumed the house of the plaintiff, about one hundred and thirty feet distant from the shed, the plaintiff could not recover of the company for the loss he had thereby sustained.[1] So, where a railroad company, through its negligence, set fire to the house of another, and the fire therefrom was communicated to the house of a third party, which was consumed with its contents, it was held that the railroad company was not liable for the loss of the last building or its contents thus destroyed.[2] * * * On the other hand, in several recent and well-considered cases, it has been held that such losses may be recovered; that such damages are not too remote from the negligent cause; that the casual connection between the negligence and the losses of the respective parties is complete, and that the question of negligence of the company, and of the other parties, should be submitted to the jury under all the circumstances of the case, Thus, in Illinois, where it appeared that a locomotive, belonging to the defendant, in passing through a village with a train of cars, threw out great quantities of unusually large cinders, which set on fire a warehouse near the track, the heat and flames from which ignited a building of the plaintiff, which was situated about two hundred and fifty feet from the warehouse, and which was thereby destroyed; it was held that the company was not exonerated from liability merely because the plaintiff's house was not immediately ignited by cinders thrown from the locomotive, but by the burning of the warehouse; that it was not a conclusion of law, that the fire sent forth by the locomotive should be considered as the remote and not the proximate cause of injury to the plaintiff, but a question of fact to be determined by the jury under the instructions of the court.

"And in a recent case, where the action was for damages caused

[1] Ryan v. New York Cent. R. Co., 35 N. Y. 210.

[2] Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353.

by sparks emitted from the company's engine, kindled fires in two different places on lands not belonging to the plaintiff, and the two fires spread, and finally uniting passed over the lands of several other parties and finally reached the premises of the plaintiff, about four miles distant from the point where it first started, and there destroyed the property of the plaintiff; the court held that the loss was not too remote to allow a recovery.[1] And the same doctrine has been recently maintained in Wisconsin."[2]

SEC. 338. The reasons in support of the decisions on this question first above referred to are assailed by LAWRENCE, C. J., of the supreme court of Illinois, as follows: "It has been held by this and various other courts, that if fire is communicated to the dried grass of an adjoining field, through the carelessness of the persons managing a railway locomotive, and spreads over the field, no matter to what extent, destroying hay stacks, fences and houses, the company is liable. * * * But if these two decisions, in New York and Pennsylvania,[3] are correct law, it must be held that if fire is communicated from the locomotive to the field of A, and spreads through his field to the adjoining field of B, while A must be reimbursed by the company, B must set his loss down as due to a remote cause, and suffer in uncomplaining silence. Would there not be in such a decision a sense of palpable wrong, which would shock the public conscience and impair the confidence of the community in the administration of the law?"[4]

[1] Atchison T. & S. F. Co. v. Stanford, 12 Kans. 354; St. Jo. & D. C. R. Co. v. Chase, 11 id. 47.

[2] Field on Damages, § 664; Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223. See, also, Perley v. Eastern R. Co., 98 Mass. 415; Hart v. West. R. Co., 13 Metc. 99; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Kellogg v. Milwaukee & St. P. R. Co., Cent. L. J., vol. 1, 278; Opinions of MILLER and DILLON, JJ., U. S. C. C., Iowa, May T., 1874; Whart. on Neg., § 154.

[3] Ryan v. The New York Cent. R. Co., 35 N. Y. 214; and The Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353 (1869).

[4] Fent v. Toledo, P. & W. R. Co., 59 Ill. 349 (1871). See, also, Scott v. Shepherd, 2 Wm. Black. 892, the famous squib case; Illidge v. Goodwin, 24 E. C. L. 272; Lynch v. Nurdin, 41 id. 422; Rigby v. Hewitt, 5 Exch. 240; Greenland v. Chaplin, 5 id. 243; Montoya v. London Ass. Co. 6 id. 451; Ins. Co. v. Tweed, 7 Wall. 44; Powell v. Deveny, 3 Cush. 300; Vandenburgh v. Truax, 4 Den. 464; Hart v. West R. Co., 13 Metc. 99; Perley v. Eastern R. Co., 98 Mass. 414; Cleavelands v. Grand Trunk R. Co., 42 Vt. 449; Piggot v. Eastern, etc., R. Co., 54 E. C. L. 229; Smith v. The London & S. W. R. Co., L.R., 5 C. P. 98; Atchison T. & S.F. R. Co. v. Sanford, 12 Kans. 354 (1874).

In the last case, which was an action for damages, for the negligent setting of a fire, VALENTINE, J., in delivering the opinion of the supreme court of Kansas, observes: "After a careful

SEC. 339. The reason for holding a negligent party for the continuous, direct and natural consequences of his wrongful act, though some of the losses sustained thereby may, in respect to the successive causes and effects, be remote from the first active producing case, has frequently been recognized and seems to be based upon the soundest reasoning. It is true that the subject of causation and the tracing of causes to results is, many times, one of great difficulty. Every event is the result of certain causes, or combination of causes, more or less remote. And there may be great difficulty sometimes in tracing, or determining the legal cause of a loss sustained, or in fixing a just rule of liability in such cases. The law seems to permit the tracing back of the causes of an injury to the party who first set in motion the dangerous element which resulted in the damage.[1]

SEC. 340. According to the reasoning in some of the cases, a party whose building is ignited directly by cinders, or fire sent forth by the negligence of the agents of a railroad company, may recover therefor; but if the fire thus caused continues and burns another's buildings the company is not liable, on the ground that the latter loss is not the immediate or proximate result of the first active and producing cause. But suppose the building first

examination of this question, we are satisfied, both upon reason and authority, that the damage is not too remote to be recovered. We have already decided that where the fire has run thirty rods from the place where it was first kindled, and there does damage, the plaintiff may recover. St. Jo. & D. C. R. Co. v. Chase, 11 Kans. 47. Now, if the plaintiff may recover when the fire has run thirty rods, why may he not recover when the fire has run forty rods, or a mile, or four miles? Will it be claimed that the ownership of the property over which the fire runs can make any difference? * * * The first efficient and adequate cause, as well as every intermediate cause, necessarily following from the first cause, is always held in law to be the proximate cause, unless some new causes, independent of the first cause, shall intervene between the first cause and the final injurious result. This is equally true where the successive events are separated by clearer and better defined outlines than they are in the burning of prairie grass or a stubble field. * * * Why should not every person, whether far away or near, recover for the wrongful acts of another? Even if it should bankrupt the wrong-doer, would that be any reason for not compensating an innocent sufferer? As a question of ethics and morals, as well as of law, where a great loss is to be sustained by somebody, who should bear it, the innocent or the guilty?"

[1] See opinion of SHAW, C. J., in Marble v. City of Worcester, 4 Gray, 395; Scott v. Shepherd, 3 Wils. 403; 2 Wm. Black. 892; Big. L. Cas., L. T., note, p. 608; Field on Damages, §§ 10, 49, 50 *et seq.*, 664 *et seq.*, and notes.

ignited by the carelessness of a railroad company or other person is one of a continuous row of houses owned by A, B, C and D, and that the burning of the building of A was through the direct act or negligence of such party, and that the destruction of the others by the burning of the first was unavoidable, would B, C and D be deprived of the right of recovery on the ground that their loss was not the direct or proximate result of the wrongful act of the railroad company or its agents? Or, suppose that one party owns fifty feet of a tenement, and another party owns another fifty feet of the same, would a destruction of the property of the former by the willful act or the negligence of a party, and the unavoidable destruction of the interests of the latter thereby, exempt the wrong-doer from liability for the latter's loss, when he in no manner contributed to the same and used due diligence to avoid the loss? We think, both upon the weight of authority and of reason, that it would not; and that the liability of the wrong-doer in such a case would be the same to the latter as the former, whether it was an act of willful intention or of mere negligence. He should sustain the loss, who has set in motion the dangerous element, or been the active cause of it.

SEC. 341. **Complications arising from successive negligence.** — Some of the most complicated questions arising from the successive negligence of different parties have been presented for adjudication. "Thus, suppose that through carelessness of a railroad company, in not using a proper *spark arrester*, sparks escape from its locomotive, which, falling on dry rubbish, carelessly left by another party scattered over his premises near the railroad, and, fanned by the wind, it takes fire, and fed by the rubbish it is driven by the wind to the buildings of another party, which are thereby consumed, which party is liable for the loss?" [1] On this question Mr. Wharton says: "Supposing that had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of

[1] Field on Dam., § 666.

independent responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative."[1]

The question here presented opens up to us the consideration of the vast problems of causation. The chain of causation, viewed in the light of philosophy and enlightened reason, is endless. All events are, when contemplated in this light, the results of a combination of many antecedent causes. In the language of Mr. Mill, "for every event there exists some combination of objects or events, some given combination of objects and events, some given concurrence of circumstances positive or negative, the occurrence of which will always be followed by that phenomenon. We may not have found out what this concurrence of circumstances may be, but we never doubt there is such a one, and that it never occurs without having the phenomenon in question as its effect or consequence. * * * It is seldom, if ever, between a consequent and one single antecedent that this invariable sequence subsists. It is usually between a consequent and the sum of several antecedents, the concurrence of all of them being requisite to produce, that is, to be certain of being followed by the consequent. In such a case it is very common to single out one only of the antecedents under the denomination of cause, calling the others merely conditions."[2]

SEC. 342. We may observe that the maxim *causa proxima et non remota spectatur*, which is frequently applied as a maxim to limit the liability of parties for injuries or losses sustained, is an imperfect rule, and under the decisions of the courts is practically disregarded in determining the limits of liability for a wrong done. We find the chain of causation by successive links endless,

[1] Whart. on Neg., § 134 *et seq.*

[2] 1 Mill's Logic (2 Lond. ed.), 398.

and the limitation of damages by the maxim to the proximate cause; but we also find the courts, disregarding the literal interpretation of the maxim, have extended the liability in numerous cases to more remote consequences of a wrong. Is there a distinction, as to approximate cause, between science and law? Is there practically any line of limitation in respect to the remoteness of the consequences of a wrong for which a wrong-doer is not liable? Or does this depend upon the motives of the wrong-doer, or the degree or character of the wrong?

Take the famous Squib case, already cited, where the defendant threw into the market place on fair day a squib, which different parties, which we may designate as A, B and C, caught up, and to avoid injury to themselves, threw away, until it struck and destroyed the eye of the plaintiff. The whole movement of the squib was, by a fiction of the law, or in a legal sense, considered the act of the party who first threw it, although, but for the acts of the other parties the loss could not have happened. Again, take the case of *Atchison, etc., R. Co.* v. *Stanford*,[1] where by the negligence of a railroad company sparks emitted from a locomotive of the railroad company set fire to grass, which spread over the premises of several parties, and finally caught and consumed the property of the plaintiff, and where the court held that the loss was not too remote, and that the railroad company was liable.[2]

SEC. 343. But a larger rule of liability has sometimes been recognized in case of the willful wrong-doing of another, than in case of mere negligence. Thus, if a party should willfully set fire to a building, he would undoubtedly be held to contemplate all the damages which legitimately followed therefrom, and be responsible for all damages that resulted to any party however remote or extended the result from the original act.[3] And in view of this doctrine we have heretofore been led to affirm that the rule of extended liability in such cases depends upon the motives of the wrong-doer, or the degree of negligence manifested in the particular case;[4] that the subject is too subtle to allow any definite line of

[1] 12 Kans. 354.

[2] See, also, Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Perley *v.* Eastern R. Co., 98 Mass. 415.

[3] Allison *v.* Chandler, 11 Mich. 542; Field on Dam., §§ 53, 78; Mayne on Dam. 25 *et seq.*

[4] Field on Dam., § 53.

liability to be drawn,[1] and that "there is a tendency to recognize a rule on this subject of liability for the consequences of a wrong somewhat flexible and elastic, varying in cases of torts, as we shall have occasion to notice more fully hereafter, with the motives of the wrong-doer, and covering more or less extended and remote consequences, depending on the character, grade or degree of the wrong done."[2] And it has also been stated as a legal proposition that, "in cases of officious interference with property, willful wrongs, frauds or gross negligence, the liability may extend to remote effects and losses, even those that are the result of a natural chain of effects, produced and caused by the original wrong."[3]

SEC. 344. In cases of the positive negligence of a party, where there is loss sustained, even though it immediately results from the passive negligence of an intervening party, it seems to me more consonant with principles of justice to hold the party responsible who set in motion the dangerous element, that, although affected by intervening causes, produced the result; that where, except for the negligence of an intermediate party, the loss would not have occurred, still, if the negligence of such party would not have resulted in any loss, except for the positive and active negligence, or willful act of another, who set in motion or was the active creator of causes, but for which the passive negligence of another would have resulted in no injury, but by which, and through such negligence or willful act a loss finally results to another, the party negligently or willfully acting, or originally setting in motion the cause of injury, should be held responsible for all the natural, probable, and legitimate consequences of such wrongful act, and, especially in cases of willful and intentional wrong, for all the consequences thereof, however remote.[4]

SEC. 346. **Damages generally in cases of torts.**—We have stated that a corporation should be liable to damages for its torts the

[1] Field on Dam., § 32.

[2] Field on Dam., § 13.

[3] Id., §§ 32, 53 *et seq.;* McDaniel *v.* Emanuel, 2 Rich. (S. C.) 455; Strawbridge *v.* Turner, 9 La. 213; Powell *v.* Salisbury, 2 Y. & J. 391; Saxton *v.* Bacon, 31 Vt. 540; West *v.* Forrest, 22 Mo. 344.

[4] Field on Dam., §§ 52, 53, 78; Mayne on Dam. 25 *et seq.*

same as a natural person. The measure of damages would of course be the same; but some illustrations of this subject may be beneficial, although it more appropriately belongs to a treatise especially devoted to the law of damages.[1]

In case of injury to the person of another from the negligence of a railroad or other corporation, to which the plaintiff did not in any material manner contribute, the elements of damages may be summarized as follows:

1. Loss of services during the time the injured party is incapacitated.[2]
2. Expenses of medical, surgical and other attendance.[3]
3. Bodily pain and mental anguish.[4]
4. Permanent disability, which the jury may take into consideration in estimating the present damages.[5]
5. Exemplary damages, where such are allowable by the law of the locality where the trial is had, and where the circumstances of the case authorize it.[6]

SEC. 346. In relation to permanent injury as an element of damages, it may be observed that damages "although generally limited to the injury at or before the commencement of the suit, or to the time of trial, yet, it frequently occurs, that in determining the present injury, matters of a prospective character must also be considered, and particularly where the injury is of a permanent character, damages for the future injury should be allowed. Thus, where the claim was for breaking a leg, it was held proper to show the probable future condition of the limb, but not the

[1] Field on Damages, ch. 20; Sedg. on Dam. 99 *et seq.*

[2] Wade *v.* Leroy, 20 How. 34; Morse *v.* Auburn, etc., R. Co., 10 Barb. 621; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 541.

[3] Peoria Bridge Association *v.* Loomis, 20 Ill. 235; Beardsley *v.* Swann, 4 McLean, 333; Ransom *v.* New York, etc., R. Co., 15 N. Y. 415; Moody *v.* Osgood, 50 Barb. 628.

[4] Ranson *v.* N. Y. & Erie R. Co., 15 N. Y. 415; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. 282; Linsley *v.* Bushnell, 15 Conn. 225; West *v.* Forrest, 22 Mo. 344; McKinley *v.* The Chicago & N. W. R. Co., 44 Ia.— (not published), where it was held, among other things, that mental anguish was a proper element of actual damages.

[5] Masters *v.* Warren, 27 Conn. 293; Seger *v.* Barkhamstead, 22 id. 290; Wade *v.* Leroy, 20 How. 34; Curtis *v.* Rochester, etc., R. Co., 18 N. Y. 534.

[6] Winters *v.* Hannibal, etc., R. Co., 39 Mo. 468; Field on Dam., §§ 614, 667 *et seq.* and notes; Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657; Southern R. C. *v.* Kendrick, 40 Miss. 374; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162; Goddard *v.* Grand T. R. Co., 57 Me. 202; Belknap *v.* Boston, etc., R. Co., 49 N. H. 358; Caldwell *v.* N. J. Steam B. Co., 47 N. Y. 282.

consequences of a hypothetical second fracture.[1] In such a case it is proper also to consider diminished capacity to work at the plaintiff's trade, arising from the injury."[2]

SEC. 347. **Exemplary damages.**—The application of the doctrine of exemplary damages to corporations has been attended with much difficulty. The reason for allowing them assigned by its advocates would hardly seem applicable to them, viz.: that of punishing the wrong-doer. For wrong implies at least a malicious intent, but how can it be said that an ideal and imaginary person can have a mind which cherishes malice, or an evil or wrongful intent. The general rule in reference to exemplary damages has been thus stated: "For torts, under circumstances of great aggravation, the jury, in addition to such actual damages as they may find the injured party entitled to, * * * may further allow for an example to others and a punishment of the wrong-doer, exemplary or punitive damages."[3] The damages

[1] Lincoln *v.* Saratoga R.Co., 23 Wend. 425. See, also, Johnson *v.* Perry, 2 Humph. 572; Curtiss *v.* Rochester, etc., R. Co., 20 Barb. 282.

[2] Field on Dam., §§ 614, 615; Donell *v.* Sandford, 11 La. Ann. 645. See, also, Filer *v.* The N. Y. Cent. R. Co., 49 N. Y. 42; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19; Frink *v.* Schroyer, 18 id. 416; Slater *v.* Rink, id. 527; Passenger R. Co. *v.* Donahue, 70 Pa. St. 119; Kansas Pac. R. Co. *v.* Pointer, 9 Kans. 620; City of Chicago *v.* Langlass, 52 Ill. 256; Fair *v.* Lond. & N. W. R. Co., 21 L. T. (N. S.) 326; Holyoke *v.* Railway Co., 48 N. H. 541; Weisenberg *v.* City of Appleton, 26 Wis. 56.

The same doctrine is held applicable to injuries sustained by the negligence of a municipal corporation. Peoria Bridge Assoc. *v.* Loomis, 20 Ill. 235; Hunt *v.* Hoyt, id. 544; Mason *v.* The Inhabitants of Ellsworth, 32 Me. 271; City of Ripon *v.* Bittel, 30 Wis. 614; Nebraska City *v.* Campbell, 2 Black. 590. See, also, Morse *v.* Auburn & S. R. Co., 10 Barb. 621; Rawson *v.* N. Y. & Erie R. Co., 15 N. Y. 415; Keyes *v.* Devlin, 3 E. D. S. 518; Bannon *v.* Baltimore & O. R. Co., 24 Md. 108; Seger *v.* Barkhamsted, 22 Conn. 290; Lawrence *v.* Housatonic R. Co., 29 Conn. 390; Fairchilds *v.* Cal. Stage Co., 13 Cal. 599; Pennsylvania Canal Co. *v.* Graham, 63 Pa. St. 290; Smith *v.* Holcomb, 99 Mass. 552; Holyoke *v.* Grand T. R. Co., 48 N. H. 541; Stockton *v.* Frye, 4 Gill. 406; Matteson *v.* N. Y. C. R. Co., 62 Barb. 364; Smith *v.* Overby, 30 Ga. 241; Cox *v.* Vanderkleed, 21 Ind. 164; McGrew *v.* Stone, 53 Pa. St. 436; Ballou *v.* Farnum, 11 Allen, 73; Caldwell *v.* Murphy, 1 Duer, 233; 1 Kern. 416; Kinney *v.* Crocker, 18 Wis. 74; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396; Aaron *v.* Second Av. R. Co., 2 Daly, 127; Aldrich *v.* Palmer, 24 Cal. 518; Wheaton *v.* North Beach R. Co., 36 id. 590; Illinois C. R. Co. *v.* Barron, 5 Wall. 90; Page *v.* Mitchel, 13 Mich. 63; Joslyn *v.* McAllister, 22 id. 300.

[3] Field on Dam., § 32. In a note to this section it is observed: "Although the author has felt compelled from the preponderance of authority, to thus state the rule, he would also express his convictions that the adoption of the doctrine was a departure from the true principles of the law of damages and of public policy and a flaw in the structure of our jurisprudence, involving much controversy, and resulting in confusion and uncertainty. Nor is the doctrine by any means so deeply rooted

awarded are perhaps in most cases the same whether the doctrine of exemplary damages as advocated by Mr. Sedgwick, or the doctrine of actual damages as maintained by Mr. Greenleaf, be adopted.[1]

SEC. 348. According to the doctrine of actual damages only, the rule adopted would give adequate damages, not only for those pecuniary losses sustained which may be capable of a certain and definite pecuniary estimate, such as loss of time, clothing, and expenses of medical and other attendance, necessarily sustained and incurred by reason of the wrong of the defendant, but also for those other indefinite and uncertain damages not capable of definite pecuniary estimate, such as injury to the person, mental agony, lacerated feelings, disappointed hopes, and paternal affections. These elements of damages also usually enter into the estimate and determine the amount of exemplary damages allowed by them. The general result, therefore, may be practically the same; or we may say, in the language of Mr. Justice COLE: "The controversy on this subject between Prof. Greenleaf and Mr. Sedgwick may, perhaps, after all the attention and discussion it has excited, be found to be a controversy as to the terminology of the law rather than as to the extent of the right of recovery or the real measure of damages. Prof. Greenleaf holds that, while the plaintiff can only recover compensation, he is not confined to the proof of actual pecuniary loss, but that the jury may take into consideration every circumstance of the act which injuriously affected the plaintiff not only in his property but in his person, his peace of mind, his quiet and sense of security in the enjoyment of his rights; in short, his happiness. But it must affect his happiness and not his neighbor's; and therefore to this question alone the jury should be restricted. While Mr. Sedgwick holds that "wherever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of com-

in the common law, as to be placed beyond the bounds of controversy." Field on Dam., § 32, note 1. See, also, Id., §§ 73, 74, 76, 77. See, also, Fay v. Parker, 53 N. H. 342.

[1] See Sedg. on Dam. (3d ed.) Appendix and note; 2 Greenl. on Ev., §§ 266, 267; Field on Dam., §§ 26, 73, 74, 76.

pensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interests of society and the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender."[1]

SEC. 349. **Application of the doctrine to private corporations.**—We have already intimated that the doctrine of exemplary damages loses much of its force when it is sought to apply it to corporations; for as corporate acts, whether tortious or otherwise, must be done by agents, and the corporate body is but an imaginary one, without a physical or mental organization, it is a mere fiction of the law which supposes them capable of a wrongful intent. But, notwithstanding this, they are frequently held liable in a civil action, like natural persons, for the negligence and even for the wanton and malicious acts of their servants or agents, when committed in the line of their employment or within the scope of their duty.

Great extremes of views are, however, held by various decisions on the question of liability of corporations for exemplary damages. But many cases which have been assumed to sustain the doctrine are not clear as to the true basis of damages in such cases; and if it is evident that some of them rest upon the gross negligence of the agents or persons that may be held to represent the corporation in employing, or knowingly continuing incompetent agents in their employment, and the liability in some cases is made to rest upon grounds of public policy.[2]

In others, the right to exemplary damages rests upon some positive direction or authority of the company, or upon some subsequent indorsement or approval of the acts of the agent,[3] and in others the doctrine is held to be applicable, even where the tort is neither authorized nor ratified, as, unlike natural persons, corporations can be subject to no other corrective influence than pecuniary loss.[4]

[1] Hendrickson v. Kingsbury, 21 Ia. 379.

[2] Field on Dam., § 87; Shearm. & Redf. on Neg., §§ 600, 601, and notes.

[3] Field on Dam., § 85 *et seq.*; Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; Hagan v. Providence R. Co., 3 R. I. 88; Belknap v. Boston, etc., R. Co., 49 N. H. 358.

[4] Field on Dam., § 85.

SEC. 350. **Extreme doctrine of liability for exemplary damages.** — The application of rules relating both to ordinary and exemplary damages against corporations are most common in case of the negligence of the servants and agents of railroad corporations. Their servants and agents are generally very numerous, and their duties are frequently important, and require the exercise of much care and judgment.

In a recent case in Maine, where a brakeman grossly insulted a passenger, and the railroad company was sued therefor, the supreme court of that state held the following extreme doctrine on this subject: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations, in their capacity of common carriers of passengers, and might as well not be applied to them at all, as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified, for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants. All of its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds, executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering, is predicable of this ideal existence called a corporation. And yet, under cover of its name and authority, there is as much that is deserving of punishment as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks — since no coercive influence can be brought to bear upon them except that of pecuniary loss — it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons." [1]

[1] WALTON, J., in Goddard v. Grand T. R. Co., 57 Me. 202. See, also, Railroad Co. v. Hurst, 36 Miss. 660; Railroad Co. v. Blocher, 27 Md. 277.

But the weight of authority, in order to hold the corporation liable for exemplary or punitive damages, would seem to require that the corporation either consent to, or authorize, or ratify the tort of the servant; the same as would be required, if the wrong were done by a natural person, in order to visit on him exemplary damages.[1]

Why punish the principal, who has not done the injury, or had any such purpose, and is personally free from fault; and especially where there are no circumstances indicating any want of care, or any negligence in fact on his part.[2]

But it has been held that the corporation may be guilty of gross negligence, so as to authorize the imposition of exemplary damages where it knowingly permits an incompetent or unfit agent to continue in the business of the corporation, and where the injury, coming within the class of cases that authorizes exemplary damages, was the result of such incompetence and unfitness.[3]

In the case of *Goddard* v. *Grand Trunk R. Co.*, the decision might perhaps have rested upon the doctrine of indorsement of the acts of the agent.[4]

On this subject the court of appeals of New York observe: "For injuries by the negligence of a servant, while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed

[1] Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282; Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657; Turner *v.* North Beach R. Co., 34 id. 594; Hill *v.* N. O., etc., R. Co., 11 La. Ann. 292; Milwaukee, etc., R. Co. *v.* Finney, 10 Wis. 388; Boulard *v.* Calhoun, 13 La. Ann. 445; Hagan *v.* Providence R. Co., 3 R. I. 88; Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70, Clark *v.* Newsam, 1 Exch. 131; Ackerson *v.* Erie R. Co., 32 N. J. 254; Belknap *v.* Boston, etc., R. Co., 49 N. H. 358; Bowler *v.* Lane, 3 Metc. (Ky.) 311.

[2] Field on Damages, § 86; Shearm. & Redf. on Neg., § 601.

[3] Id. See, also, Shearm. & Redf. on Neg., §§ 600, 601, and notes.

[4] See Field on Damages, § 87, and notes.

In a more recent and a more temperate opinion, the same learned judge maintains the views expressed in Goddard *v.* Grand T. R. Co., *supra.* See opinion WALTON, J., in Hanson *v.* Railroad Co., 62 Me. 84.

or retained the servant, knowing that he was incompetent, or from bad habits, unfit for the position he occupied." [1]

SEC. 351. **Gross negligence which authorizes exemplary damages.**— In order to authorize exemplary damages for negligence under any circumstances, the negligence should be very flagrant and culpable or the circumstances must show a very reckless indifference to duty or utter want of regard for persons or their property, from which it has been held that malice may be well inferred or imputed to the defendant.[2] Mere gross negligence is held not to be sufficient to warrant exemplary damages, even where the general doctrine is recognized; but the negligence must be so gross as to raise a presumption that the party in fault is conscious of the probable consequences of his negligence or carelessness, and is indifferent to the injury likely to follow.[3] And the corporation cannot in any case be liable for punitive damages for the acts of an agent where the agent himself would not be liable, were the suit brought against the agent himself.[4]

SEC. 352. **Inconsistency of the rule in its application to corporations.**— The difficulty and inconsistency, if not the absurdity of the application of the doctrine of exemplary damages, especially to corporations, has been frequently referred to aud maintained by the

[1] Cleghorn *v.* N. Y. Cent., etc., R. Co., 56 N. Y. 44.

[2] Field on Dam., § 84. See, also, Welch *v.* Durand, 36 Conn. 182; Walker *v.* Erie R. Co., 63 Barb. 260; Farwell *v.* Warren, 51 Ill. 467; Green *v.* Craig, 47 Mo. 90; New Orleans, etc., R. Co. *v.* Statham, 42 Miss. 607; Pickett *v.* Crook, 20 Wis. 358; Holyoke *v.* Grand Trunk R. Co., 48 N. H. 544.

[3] Wallace *v.* Mayor, etc., 2 Hilt. 440; Heil *v.* Glanding, 42 Pa. St. 493; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282; Cochran *v.* Miller, 13 Ia. 128; Brannon *v.* Baltimore R. Co., 47 N.Y. 280; Vicksburg Railroad Co. *v.* Patton, 31 Miss. 156. See, also, the English cases, Emblen *v.* Myers, 6 H. & N. 54; 3 L. J. Exch. 71; Bell *v.* Midland, etc., R. Co., 9 W. R. 612; 10 C. B. (N. S.) 287; 3 L. J. C.P. 73. See, also, Cleghorn *v.* N. Y. Cent., etc., R. Co., 56 N. Y. 44; Caldwell *v.* N. J. Steamboat R. Co., 47 id. 296.

[4] Ackerson *v.* Erie R. Co., 3 Vroom, 254; Hamilton *v.* Third Av. R. Co., 53 N. Y. 25; Townsend *v.* N. Y. Cent. R. Co., 56 id. 295. See, also, further on the subject of corporate liability for exemplary damages, Hopkins *v.* A. & St. R. Co., 36 N. H. 9; Taylor *v.* Railway Co., 48 id. 304; Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108; Baltimore, etc., R. Co. *v.* Blocher, 27 id. 277; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156; New Orleans, etc., R. Co. *v.* Hurst, 36 id. 660; Hill *v.* New Orleans, etc., R. Co., 11 La. Ann. 445; Jeffersonville, etc., R. Co. *v.* Rogers, 38 Ind. 116; Atlantic, etc., R. Co. *v.* Dunn, 19 Ohio St. 162; Frink *v.* Coe, 4 Greene (Ia.), 555; Perkins *v.* Missouri, etc., R. Co., 55 Mo. 201; Sedg. on Dam. 566 *et seq.*

most conclusive reasoning. The doctrine is based upon the supposition of willful wrong, or wicked intention. It supposes the purpose to do wrong. And the ground for the infliction of exemplary damages is in the nature of a punishment for that wrong, and also to thereby afford an example to others. But how can a corporation be guilty of a moral wrong? And on what principle can a corporation be held for exemplary damages for the moral wrongs of its servant to which it has in no way contributed, nor of which it has in no manner approved? In the able dissenting opinion of Mr. Justice TAPLEY, in *Goddard* v. *Grand Railroad Company* (from which we have already quoted from the opinion of the majority of the court, as given by Mr. Justice WALTON), he observes: "The theory of punitive damages is the infliction of a punishment for an offense committed. It presupposes the existence of a moral wrong, an infraction of the moral code; a wrong in which the community has some interest in the redress and in securing immunity from in the future. It presupposes also an offender, and designs to punish that offender. To punish one not an offender is against the whole theory, policy and practice of the law and its administration. * * * The idea of punishing one who is not *particeps criminis* in the wrong done is so entirely devoid of the first principles and fundamental elements of the law, that it can never find place among the rules of action in an intelligent community." [1]

The absurdity thus presented and, in fact, the apparent want of foundation of the doctrine on any sound principle, has recently led to full and exhaustive consideration of the whole subject; and in a recent case in New Hampshire, where there had been an apparent if not a complete recognition of the doctrine, the supreme court of that state entirely repudiated it, as unsound in principle and entirely unnnecessary in the measure of adequate damages, even in cases of the most aggravated torts.

SEC. 353. **Recent examination of the doctrine of exemplary damages.** — In the case above referred to, there was a critical examination of this doctrine and a review of the authorities bearing upon it,

[1] See dissenting opinion of TAPLEY, J., in Goddard v. Grand Trunk R. Co. 57 Me. 202.

and Mr. Justice NELSON, who delivered the opinion, observes: "Perhaps it would not be erroneous to say that the question has not been thoroughly examined and very carefully considered, but it has been suffered to lean upon and sustain itself by the supposed weight of authority, rather than to stand upon principle and inherent strength. At any rate, in view of the more recent cases, wholly contradicting and irreconcilable as we have seen them to be, * * * we are constrained to adopt the language of Judge CUSHING, in *Symonds* v. *Carter*,[1] and to say, * * * 'The doctrine in regard to vindictive damages seems to be now in such an unsettled condition as to justify and call for an examination of the authorities.'"[2] And after a review of various authorities supposed to sustain the doctrine, he proceeds to observe: "This review of some of the prominent cases touching the subject under consideration, it seems to me, must compel the conclusion which has already been indicated, that the modern, erroneous idea of exemplary damages originated in, and is, in fact, the same thing as damages for wounded feelings, as distinguished from damages for an injury to the person or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, and so forth, being much emphasized, and often being the principal damage suffered by the plaintiff, and language being loosely used and not preserving the true distinction carefully, or intemperately used, in the heat of indignation, which judges often felt and could not repress while contemplating an enormous outrage, it finally came to be understood that damages might be given in a civil suit, as a punishment for an offense against the public, an idea that is certainly not plainly declared (as I think I have unmistakably shown) in the early cases. * * * The result is, that the wholesale doctrine of damages for mental pain and wounded feeling, expressed in inconsiderate language vehemently announced, under circumstances and on occasions of judicial anger, irritation and excitement, has come to be misunderstood and mistaken for the doctrine of punitive damages, when, in fact, it is but a branch of the law of compensatory damages. * * * Thus, the doctrine of compensation for the plaintiff has become the doctrine of punishment for the defendant, importing into

[1] 32 N. H. 458.

[2] Fay v. Parker, 53 N. H. 342.

civil suits that punishment which still remains in criminal procedure; and so, unfairly and unconstitutionally, as well as illogically, punishing an offender twice for the same crime. * * * What is civil remedy but reparation for the wrong inflicted to the injury of the party seeking redress, compensation for damages sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."[1]

SEC. 354. The conclusions, in the opinion of the court in the case last referred to, are strongly supported by the doctrines, and the principles and elements of damages, announced by the early writers. It was, for instance, affirmed by Mr. Rutherford, over a hundred years ago, that damages was every loss or diminution of what was a man's own, occasioned by the fault of another; that a loss or diminution of a man's right to life, limbs, liberty, character and reputation, through the fault of another, gives him a right to demand reparation from him by whose fault they have been lost or diminished; that the person who has been maimed has a right to enjoy the freedom from pain thus caused, and that he has a right to demand *smart money*, that is, indemnity in money for the smarts or pains caused by such wrongful act; that he should be entitled to recover such money, for blemishes which remain after the original smart or pain is over; that if a person has been wounded without cause, he should recover, not only for the loss of time and expense of cure, but for the pain he has felt; that if he has been beaten, but has sustained no loss of time, or incurred no expenses thereby, he is still entitled to recover *smart money*, or satisfaction for the pain he has suffered; and that, if he has been unlawfully imprisoned, "the mere uneasiness arising from the situation under which he may include the disgrace attending it, is a damage to him."[2]

[1] Fay v. Parker, 53 N. H. 342.

[2] See Rutherford's Ins., B. 1, ch. 17, §§ 1, 10.

SEC. 355. The term "*smart money*" has frequently been used in modern decisions as synonymous with exemplary or punitive damages; and to indicate damages given to punish the offender, and as an example to others. But referring to the meaning conveyed by the term "*smart money*," as used by Mr. Rutherford, we formerly observed: "We may here discover the origin of the term "*smart money*," which was evidently used in England over a hundred years ago, and especially by this distinguished author, in a different legal sense from the one now conveyed by its use, in connection with damages. It was then used to convey the idea of mere compensation for suffering or *smarts*, physical or mental, which an injured person suffered, and not to indicate a punishment of the wrong-doer, neither to make him smart for his wrong done, nor to deter others from a repetition of similar wrongs. The doctrine, even in cases of aggravated wrongs, was that of reparation and compensation, and not that of punishment or example."[1]

SEC. 356. **Conflict growing out of the diverse rules.** — Considerable conflict and inharmony has resulted in the adoption of different views and rules for the measure of damages. On the grounds and for the reasons to which we have referred, against the application of the doctrine of exemplary damages, in general, its application to corporations seems unnecessary. And the rejection of mental suffering, resulting from indignity to the person or outrage, under circumstances of aggravation, as an element of actual damages presents the strange anomaly of the possibility of the most intense and protracted mental suffering, caused by the wrongful act of another, without any remedy therefor. But where the doctrine of mere compensation for the losses sustained is only recognized, this is extended to cover all those results of injury, and incidental losses, such as injury to the feelings and affections, wounded pride, mental agony and suffering, which are not susceptible of any exact pecuniary estimate; and which, where the doctrine of exemplary damages is recognized, is usually covered in a general way by an allowance of exemplary damages, notwithstanding the jurors in estimating

[1] Field on Dam., § 74. See, also, Detroit Post Co. v. McArthur, 16 Mich. 447; McKinley v. The Chicago & N. W. R. Co., 44 Ia. [not published.]

these, in fact, take into consideration all the circumstances of aggravation and suffering, in determining the proper amount of them.

After some controversy and confusion, in relation to this matter, there seems, however, to be a tendency of the courts, even where the doctrine of exemplary damages is recognized, to allow mental suffering as an element of actual damage.[1]

SEC. 357. **Damages for injuries resulting in death.** — The generally recognized common-law doctrine, that although a party might recover full compensation at least for an injury to his person, still, if the injury was so severe that death ensued, nothing could be recovered; has recently been assailed as based upon a mere dictum of Lord ELLENBOROUGH, and as unfounded in reason.[2]

But not only in England, but in the various states, there are statutes providing that actions may be maintained by the representatives of deceased persons, for damages sustained by the widow, next of kin, or estate of the deceased or some of them, by reason of the wrongful act of the defendant producing the death.[3] Under these statutes there have been, on various important questions, presented for adjudication a great uniformity in the decisions. For instance, in the absence of special statutory regulations on the subject contained in these statutes, it has uniformly been held that only actual and not exemplary damages can be recovered; that nothing can be recovered for the physical or mental sufferings of the deceased, or for the sorrow, suffering or grief of the parties entitled to the benefit of the statutes;[4] that

[1] See McKinley v. The Chic. & N. W. R. Co., 44 Ia. [not published]; Fay v. Parker, *supra*.

[2] See opinion of Lord ELLENBOROUGH, in Baker v. Bolton, 1 Camp 493. See opposing views, DILLON, J., in Sullivan v. Union P. R. Co., 3 Dillon, 334, U. S. C. C., Dist. Neb., Oct. T., 1874; 1 Cent. L. J. 595; Jones v. Perry, 2 Esp. 482; Cross v. Guthrey, 2 Root (Conn.), 90. Also discussion in 1 Cent. L. J. 590, 614, 622; Field on Dam., § 626.

[3] For copies of the various statutes relating to this subject, see Field on Dam., §§ 227, 228, 299 and notes.

[4] See decisions under the English statutes, Duckworth v. Johnson, 4 H. & N. 653; S. C., 7 Am. L. Reg. 680; Franklin v. S. E. Railway Co., 3 H. & N. 211; Blake v. Mid. R. Co., 18 Q. B. 93; S. C., 83 Eng. Com. L. & Eq. 93; 10 Eng. L. & Eq. 437; Gillard v. The Lancashire, etc., R. Co., 12 L. T. 356.

For decisions under various statutes of the states see Pennsylvania, etc., R. Co. v. McCloskey, 23 Pa. St. 526; Same v. Zebe, 33 id. 318; Same v. Kelly, 31 id. 372; Same v. Vandever, 36 id. 298; Same v. Henderson, 51 id. 315; North Pennsylvania R. Co. v. Robinson, 44 id. 175; Cleveland, etc., R. Co. v. Rowan, 66 id. 393; Whitford v. Panama R. Co., 23 N. Y. 465; Quin v. Moore, 15 id. 432; McIntyre v. N. Y.

damages can only embrace those matters that are the source of pecuniary injury to the persons for whose benefit the statutes were intended, but that the jury have great latitude in estimating such damages;[1] that nothing can be allowed by way of *solatium* for grief or loss of society;[2] and that the jury cannot consider, in an action for the death of a wife, the loss of her society, or the husband's mental suffering, as an element of damages.[3]

SEC. 358. **Elements of damages in case of death; what it is competent to show.** — In case of liability under the statutes for the death of a person, it has been held that it was competent to show the value of the life of the deceased to the parties entitled to recover therefor;[4] the loss of personal care and training, and intellectual and moral culture which would have been received had the deceased lived; "the exact situation, annual earnings, habits, health and estate of the deceased; the profits of his labor or business; what he would have earned for the support of those entitled to recover, or for the estate, as the case may be, and the probability or reasonable expectation of the life of the deceased at the time of the injury, and which may be determined by reference to the 'Carlisle' or other tables of recognized scientific accuracy relating to the expectation of human life."[5]

Cent. R. Co., 47 Barb. 515; Lehman v. Brooklyn, 29 id. 234; State of Maryland v. Baltimore, etc., R. Co., 24 Md. 84; Central R. Co. v. Baches, 55 Ill. 379; Central R. Co. v. Weldon, 52 id. 290; Chicago & N. W. R. Co. v. Swett, 45 id. 197; Chicago & Alt. R. Co. v. Shannon, 43 id. 338; City of Chicago v. Major, 18 id. 349; Donaldson v. Miss. & Mo. R. Co., 18 Ia. 280; Telfer v. Northern R. Co., 1 Vroom, 188.

[1] Pensylvania R. Co. v. Keller, 67 Pa. St. 300; Tilley v. Hudson R.R. Co., 29 N. Y. 252; Duckworth v. Johnson, 4 H. & N. 653; Paulmier v. Erie R. Co., 34 N. J. L. 151.

[2] Pyne v. Great N. R. Co., 4 B. & S. 396; Jour. (N. S.) 199; 32 L. J. Q. B. 377; 11 W. R. 923; 8 L. T. (N. S.) 734.

[3] Green v. Hudson River R. Co., 32 Barb. 25; Blake v. Midland R. Co., 18 Q. B. 93; 21 L. J. Q. B. 233. See, also, Donaldson v. Miss. & Mo. R. Co., 18 Ia. 280.

It may be observed that no deduction from the amount to which the parties may be entitled can be made on account of any insurance by them or others on the life of the deceased. Althorpf v. Wolfe, 22 N.Y. 355; Harding v. Townshend, 43 Vt. 536; Pittsburg, etc., R. Co. v. Thompson, 56 Ill. 138; Field on Dam., § 587 *et seq.* and notes.

[4] Field on Dam., § 631. See, also, in support of the propositions made, Pa. R. Co. v. Keller, 67 Pa. St. 300; Krester v. Smith, 66 N. C. 154; McIntyre v. N. Y. Cent. R. Co., 37 N. Y. 287; 35 How. Pr. 36; Quin v. Moore, 15 N. Y. 435; Sherman v. West Stage Co., 24 Ia. 515; Illinois, etc., R. Co. v. Weldon, 52 Ill. 290; Baltimore, etc., R. Co. v. State, 33 Md. 542; David v. South W. R. Co., 41 Ga. 223.

[5] Field on Dam., § 632.

CHAPTER XIII.

SUITS AT LAW BY AND AGAINST CORPORATIONS.

SEC. 360. **The right to sue and the liability to be sued, a common law incident.** — One of the common law incidents of a corporation is the capacity of suing and being sued, the same as a natural person. This power is usually contained among the specified powers, in general incorporating acts. It is evident that not only corporations, but natural persons, would, in many cases, be without remedy for wrongs suffered, if this right did not exist. As corporations may take, hold and convey property, make contracts, and appoint agents, and in pursuit of their respective objects and business, inflict and suffer wrongs and injuries, it is but reasonable that they should have the capacity, not only to sue, but also of being sued.

The remedy is quite as important as the legal right, and if the law gives a right it should furnish a means to vindicate and maintain it; *lex semper debet remedium.*[1] He who has a right should have a remedy; *ubi jus ibi remedium*; and this is enforceable only by means of proceedings in courts. The right of a corporation to sue, and the liability to be sued is not only well settled as an incident of corporate capacity, but rests upon the soundest principles of justice. And this remedy includes the right, not only to ordinary proceedings in courts, but all those extraordinary remedies provided by law, and which natural persons may claim and enjoy. Where statutes give special or extraordinary remedies to persons, this is usually held to include corporations. And the statutes of some of the states of the Union expressly provide that whenever the word "person" is used in the statutes it includes corporations.[2]

SEC. 361. **May sue and be sued by members.** — A corporation may sue or be sued by any of its members, whether natural persons or partnerships, or other corporate bodies; for its members and constituent parts are not, in a legal sense, the corporate body. Though it is composed of these members, they are but the elements which form the one artificial body. The rule that a partner cannot sue the partnership, or that a person cannot be both plaintiff and defendant in the same suit, has no application to corporations; and it is a common practice not only for a person to sue the corporation of which he is a member, but for corporations to sue their members.[3] Such suits may be brought for all the variety of causes, and in all the various forms, and in the same manner as though the parties thereto were natural persons.[4]

[1] Per HOLT, J., in Ashby *v.* White, 2 Lord Raymond, 953; Winsmore *v.* Greenbank, Willes, 577.

[2] But under the New York act of 1865, providing for incorporation for certain purposes, it has been held that the capacity of suing, and being sued, is subject to the qualification, that it is in relation to some matter within the scope of the legitimate purposes of the organization. Ancient City Club *v.* Miller, 7 Lans. 412

[3] Connell *v.* Woodard, 6 Miss. 665; Gray *v.* Portland Bank, 3 Mass. 385; Bac. Abr., tit. Corp.; Merrick *v.* Peru Coal Co., 61 Ill. 472.

[4] Dill. on Corp., ch. 23; Ang. & Am. on Corp., ch. 11.

A corporation may not only contract with, but sue its stockholders, officials or corporators, in their individual capacity. Wausau Broom Co. *v.* Plumer, 35 Wis. 274; Chicago, etc., R. Co. *v.* Howard, 7 Wall. 392; S. C., 1 With. Corp. Cas. 1.

A corporator may not only contract

SEC. 362. A corporation is an imaginary and ideal person, and its contracts are not the contracts of its individual members. "Being lawfully assembled, they represent but one person, and may, consequently, make contracts, and by their collective consent, oblige themselves thereunto."[1] It is, therefore, evident that the persons composing a corporate body may sue or be sued by a corporation, for any cause, and under any circumstances, the same as natural persons. Thus, it is held that, in case of an incorporated company with a capital stock divided into shares and held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other; that where the directors of a corporation have misapplied a portion of its funds, the stockholders may recover the amount thus misapplied, and if such misapplication is threatened they may restrain it by injunction; that where a corporation is threatened with an injury which it might restrain by injunction, but it refuses so to do, a stockholder may maintain a bill in equity, for an injunction to prevent the injury, in order to protect his own interests from immediate danger; but it has also been held that where a corporation has been injured by a tort or breach of contract, an individual stockholder will not be permitted to come into court and prosecute the cause of action, because the corporation fails or refuses so to do.[2]

SEC. 363. **Where suit may be brought.** — A corporation, being an artificial person created by the supreme authority of the state, is, in a legal sense, a citizen of the state of its creation, and is generally entitled to all the rights and privileges in court, of a citizen of the state where it is instituted. But a distinction has been made between a corporation and a natural person, in respect to its absolute right to sue in the courts of a state other than the state creat-

with his corporation but may sue or be sued on such contracts. Culbertson v. Wabash Navigation Co., 4 McLean, 554.

[1] Ayliffe's Civ. Law, tit. 35, B. 2, p. 198; 1 Bl. Com. 475; Hayden v. Middlesex Turnpike Corporation, 10 Mass. 403; The Proprietors of the Canal Bridge v. Gordon, 1 Pick. (Mass.) 304; Hartford Bank v. Hart, 3 Day (Conn.), 491; Waterbury v. Clark, 4 id. 198; Ruby v. Abyssinian Soc., 15 Me. 306; Wheelock v. Moulton, 15 Vt. 519; Isham v. Bennington Iron Co., 19 id. 249.

[2] Samuel v. Holladay, 1 Woolw (C.C.) 400; S. C., With. on Corp. Cas. 139.

ing it.[1] It is held that, outside of the territory of the sovereignty creating it, it can only maintain a suit on the ground of the comity existing between states. But, unless prevented on the ground of public policy, a corporation may usually maintain a suit in the courts of another state, the same as a natural person. [2]

The laws or institutions of other states will not be regarded where it is manifestly against the laws of the state, or of the public policy so to do.[3]

A corporation created in one state of the Union is considered as a foreign corporation in every other state; but the doctrine of the comity of states, applicable in general to the rights in courts, of foreign corporations, has still stronger force when such corporations bring suit in the courts of a sister state of the Union, from the fact of their natural, political and social, and the extent and intimacy of their commercial relations.[4] It is evident, however, that it is competent for a state to prohibit a foreign corporation, not only from doing business within its territorial limits, but from maintaining suits in its courts. The legislature of the state, in that respect, is supreme, and could prohibit a foreign corporation

[1] Lathrop v. Union Pacific R. Co., 1 McArthur, 234.

[2] Thompson v. Waters, 25 Mich. 214; 5 Cranch, 289; Second National Bank v. Lovell, 2 Cin. (O.) 397; Henriques v. Dutch West India Co., 2 Ld. Raym. 1535; Chit. on Cont. 86; National Bank St. Charles v. De Bernales, 1 C. & P. 569; Beverley v. Lincoln Gas-light Co., 6 A. & E. 829.

[3] Id. The power of the corporation of one state to make contracts in another state rests upon the comity between the states, and the comity thus extended is no impeachment of sovereignty, it being the voluntary act of the state by which it is offered, but inadmissible when contrary to its policy, or prejudicial to its interests. Bank of Augusta v. Earle, 13 Pet. 519. Mr. Story, in his treatise on the Conflict of Laws, observes: "There is then not only no impropriety in the use of the phrase, 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and is inadmissible when it is contrary to its known policy, or prejudicial to its interests." § 38.

[4] Bank of Marietta v. Pindall, 2 Rand. 465; Portsmouth Livery Co. v. Watson, 10 Mass. 91; The State of Louisiana v. Fosdick, 21 La. Ann. 434; S. C., 1 With. Corp. Cas. 581; Holcomb v. Ill., etc., Canal Co., 2 Scam. 228; Frazier v. Willcox, 4 Rob. (La.) 518; Bank of Edwardsville v. Simpson, 1 Mo. 184; Lewis v. Bank of Kentucky, 12 Ohio, 132; Ely v. Fire Ins. Co., 5 Conn. 560; Williamson v. Smoot, 7 Mart. (La.) 31; President, etc., of Lombard Bank v. Thorp, 6 Cow. 46; Hartford Bank v. Barry, 17 Mass. 97; Marine, etc., Ins. Bank v. Jauncey, 1 Barb. 486; Tombigbee, etc., R. Co. v. Kneeland, 4 How. (U. S.) 16; Guaga Iron Co. v. Dawson, 4 Blackf. 202; Savage Man. Co. v. Armstrong, 5 Shep. (Me.) 34.

As to the doctrine of the comity of states relating to contracts, and the right to enforce them by corporations as well as natural persons, see Id. See, also, Silver Lake Bank v. North, 4 Johns. Ch. 370.

from doing business therein, or impose such conditions thereon as the public policy might seem to require. As the legislature may, in the creation of private corporations, limit their powers and franchises in such a manner as it may deem proper, it is, perhaps, reasonable that they should have the power to limit or restrain foreign corporations within the state.[1]

SEC. 364. **Foreign corporations not citizens.** — The constitution of the United States provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."[2] Is a corporation within the meaning of this provision a citizen, and entitled to all the rights and the remedies of a natural person in a state other than the one where it was created and has a legal existence? This question has been settled by various adjudications, and we have already stated that a state had the power to prohibit foreign corporations from doing any business in the state, or of regulating the business, or of prohibiting it from suing in its courts. And it has been repeatedly held that corporations were not citizens within the foregoing constitutional provision, so as to entitle them to all the rights and privileges of natural persons.

SEC. 365. The term "citizen" has different meanings in different parts of the constitution of the United States. Where the constitution says that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," the word "citizens" has a different meaning from its use in that part of the constitution where it says that "the judicial power shall extend to all cases in law and equity, where the controversy is between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or citizens thereof and foreign states, citizens or subjects,"[3] and that part of the judiciary act of congress where jurisdiction is made to depend upon citizenship of one of the parties in another

[1] Frazier v. Willcox, 4 Rob. (La.) 518; Atterberry v. Knox, 4 B. Monr. 90; Marietta v. Pindall, 2 Rand. (Va.) 465; New Hope, etc., Co. v. Poughkeepsie Silk Co., 25 Wend. 648.

[2] § 2, art. 4.

[3] Art. 3, § 2.

state,[1] and the act providing for the removal of suits from the state courts to the circuit courts of the United States.[2]

SEC. 366. In the former case it is held that corporations are not citizens in the sense of this constitutional provision.[3] It has been ably maintained that, although the individuals composing a corporation may be citizens under the provision of the constitution securing "the citizens of each state the privileges and immunities of citizens of the several states," such members of the corporation carrying on business in the corporate name are subject to the liabilities and entitled to the privileges of citizens under the constitution, but that this privilege could have no application to an invisible, intangible and artificial corporate person; that where a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the members; and that the only rights the corporation can claim are the rights conferred by the charter, and not the rights which belong to its members as citizens of a state.[4]

This view was recently ably maintained by Chief Justice BREESE, in delivering the opinion of the supreme court of Illinois, in *Ducat* v. *The City of Chicago*.[5] He says: "Corporations have no *status* in states, as citizens of the state creating them, and when they come to this state to do business and make profits, a discrimination can rightfully be made between them and our domestic corporations of the same character, and that if it should be deemed good policy by the legislature they could be so taxed or otherwise burdened, as to compel them to leave the state. They may be regarded as a benefit or a nuisance, according to the caprice of the legislature, they not being citizens in any approved sense of that term, which can be correctly understood in no other sense than that in which it was understood in common acceptation, when the constitution was adopted, and as it is universally explained by

[1] Act Sept. 24, 1798, Rev. Stat. (1874) 109.

[2] Rev. Stat. (1874) 113, § 639.

[3] Drawbridge Co. v. Shepherd, 20 How. (U. S.) 227; Louisville, etc., R. Co. v. Letson, 2 id. 497; La Fayette Ins. Co. v. French, 18 id. 404; Warren Man. Co. v. The Etna Insurance Co., 2 Paine, 501; Paul v. Virginia, 8 Wall. 168; The Insurance Company v. The Commonwealth, 5 Bush, 68.

[4] Bank of Augusta v. Earle, 13 Peters, 519.

[5] 48 Ill. 172; affirmed in Supreme Court, U. S., 10 Wall. 410; S. C., 1 Withrow's Corp. Cas. 55 and 426. See, also, Corfield v. Coryell, 4 Washb. (C. C.) 371.

writers on government, without an exception. A citizen is of the *genus homo*, inhabiting and having certain rights in some state or district. Such a being, if a citizen of New York, or of any other state of this Union, is, for many purposes, a citizen of this state, and of all the other states, and is entitled to all such privileges and immunities within the purview of the constitution, as the citizens of those states permanently residing therein are entitled to. These are personal privileges, and attach to him in every state into which he may enter, as to a human being — as a person with faculties to appreciate them, and enjoy them; not to an intangibility, a mere legal entity, an invisible artificial being, but to the man, made in God's own image. The individual citizen has the power to move from place to place, as his business or his pleasure may prompt. He has rights which are so important as to make it desirable that they should be uniform throughout this broad and expanded Union, which, in order to promote mutual friendship and free social or business intercourse among the people of the several states, were placed by this clause of article four (of the constitution) under the protection of the Federal government. In the case of corporations no such reasons exist. Corporations, in the states of their creation, are not entitled to the privileges or rights of the citizens of such states. They cannot vote at elections; they are ineligible to any public office; they cannot be executors, administrators or guardians. They are artificial beings, endowed only with such powers, and privileges, and rights, as their creator thought proper to bestow upon them. They have not the power of locomotion, and, of course, are not fit subjects, in the view above expressed, of the constitutional clause on which this case turns. Not being able to go into the states of the Union at their corporate will and pleasure, and exercise their faculties therein, they cannot, by any reasonable and just view of that clause, be deemed as coming within its spirit or object."[1]

[1] See, also, Cooley on Const. Lim. 15 and notes; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; Paul *v.* The Commonwealth of Virginia, 8 id. 168. In the latter case, Mr. Justice FIELD, on the construction of this clause in the constitution, observes: "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it

SEC. 367. It will be evident from what has been said, that foreign corporations have no absolute and constitutional rights other than in the states where constituted, and can only claim such privileges in the courts of a foreign state, as are permitted by the comity of states, and not in derogation of the express statutory or constitutional provisions of such states.

SEC. 368. **When suits may be brought in the federal courts.**—We have observed that corporations have usually the same *status* as natural persons in the courts of the state creating them, and that they do not in foreign states enjoy the full capacity of a natural person; that they are not entitled to all those privileges and immunities which natural citizens of a foreign state would be entitled to under the constitution of the United States, or, in other words, that under the provisions of the constitution referred to they are not citizens. But the term "citizen" has a different meaning in other parts of the constitution, and especially in that part of it which limits the judicial power of the courts of the United States, where the term "citizen" is held to include corporations. On this subject the constitution provides that the judicial power of the United States courts shall extend to all cases of controversy

insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness, and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind, removing from the citizens of each state the disabilities of alienage in other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the union which now exists. But the privileges and immunities secured to citizens of each state in the several states by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given. Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided), from individual liability. The corporation, being a mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created."

between a state and citizens of another state and between citizens of different states.[1]

SEC. 369. The judiciary act of congress, framed and adopted to carry into effect this provision of the constitution, gives the circuit court of the United States jurisdiction "of all suits of a civil nature at common law or in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state."[2] In the construction of this provision the courts have held that the term citizen includes corporations, and that they might sue or be sued in the circuit courts of the United States, in all cases the same as a natural person.

SEC. 371. **Corporations may be citizens under the constitution and the acts of congress, relating to judicial powers and jurisdiction of the courts of the United States.** — In reference to citizenship under the constitutional provision and the acts of congress relating to the judicial powers and jurisdiction of the United States courts, which we have referred to, it is held that a corporation has its dwelling place and residence in the state of its creation; that as an artificial legal person it has no existence beyond the territory of the sovereignty creating it; that for the purpose of conferring jurisdiction a suit against a foreign corporation must be considered as a suit against a citizen of the state creating it; that there is a presumption in such cases that the members of the corporation are citizens of the state creating it, and that no statute of the state where such corporation may transact business, nor any thing done by the corporation in regard to the manner of transacting its business, can defeat the right of the corporation to sue, or its liability to be sued in the circuit courts of the United States, as though it were a natural person and a citizen of the state where it was legally created and is located.[3] In a recent case in the supreme court of the United States, where the Commonwealth of

[1] Const., art. 3, § 2.

[2] Rev. Stat. U. S. (1875), § 629; Bank of the United States v. Devaux, 5 Cranch, 184; Inhabitants of Lincoln v. Prince, 2 Mass. 544. See, also, Rex v. Gardner, Cowp. 83; Sparenburgh v. Bannatyne, 1 B. & P. 163; Ang. & Am. on Corp. 377.

[3] Manufacturers' National Bank v. Baach, opinion by BLATCHFORD, J., in the circuit court of the United States, southern district of N. Y.; 1 With. Corp. Cas. 93.

Pennsylvania sued a corporation in the United States circuit court, and the question of jurisdiction was presented under the constitution and the act above referred to, the court held that a state might bring suit in the circuit court of the United States against a citizen of another state, but not one of her own citizens; that it did not sufficiently appear, from any averment in the declaration, that the defendant was a corporation created in California; and that a state cannot bring a suit in the United States courts against one of its own citizens.[1]

SEC. 372. In an action on certain bonds, issued by the board of supervisors of Mercer county, Illinois, where the question of the citizenship of the corporation and the jurisdiction of the circuit court of the United States based thereon, was presented, on error in the supreme court of the United States, Chief Justice CHASE, in delivering the opinion of the court, said: "The record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer county can be sued in the circuit court of the United States by a citizen of another state than Illinois. It presents but little difficulty. It has never been doubted that a corporation, all the members of which reside in the state creating it, is liable to a suit upon its contracts by the citizens of other states, but it was for many years much controverted whether an allegation, in a declaration that a corporation defendant was incorporated by a state other than that of the plaintiff and established within its limits, was a sufficient averment of jurisdiction. And in all cases prior to 1844, it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough examination in the case of the *Louisville, Cincinnati & Charleston Railroad Company* v. *Letson*,[2] and it was held that a corporation created by laws of a state and having its place of business in that state, must, for the purpose of suit, be regarded as a citizen within the meaning of the constitution giving jurisdiction founded upon citizenship.

[1] The Commonwealth of Pennsylvania *v.* The Quicksilver Mining Co., 10 Wall. 553. See, also, Railway Co. *v.* Whitton, 13 Wall. 270; The Commonwealth of Penn. *v.* The Quicksilver Mining Company, *supra.*

[2] 2 How. 497.

This decision has been since re-affirmed, and must now be taken as the settled construction of the constitution."[1]

SEC. 373. **Corporations considered as citizens under the act of congress for the removal of causes from the state to the federal courts.** — It is provided by the Revised Statutes of the United States as follows: "Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial, into the circuit court, for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section.

"First. When the suit is against an alien, or is by a citizen of the state wherein it is brought, and is against a citizen of another state, it may be removed on the petition of such defendant, filed in the said state court at the time of entering his appearance in said state court.

"Second. When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same, and a citizen of another state, it may be so removed, as against said alien or citizen of another state, upon the petition of such defendants, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court, as against the other defendants.

"Third. When a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said

[1] Cowles v. Mercer County, 7 Wall. 118 (1868); 2 With. Sel. Corp. Cas. 1. There is a conclusive presumption that the members of a corporation are citizens of the state creating it. Lathrop v. Union Pac. R. Co., 1 McArthur, 234.

court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court."[1]

SEC. 374. Under these provisions it is held, that as a corporation is a creature of the state creating it, and has no legal existence beyond the territory of the sovereignty by which it is created; that its domicile is within such territory, that a suit against a corporation by its corporate name is a suit against a citizen of the state creating it; and that for the purposes of original jurisdiction as well as the removal of causes from the state to the federal courts, under the act of congress, made for that purpose, there is a conclusive presumption that the members of a corporation are citizens of that state. And it is further held, that nothing done by a corporation in regard to the place or manner of transacting its business, and no statutes of a state in which it transacts such business can deprive the corporation of its right and privilege when sued in a state foreign to the one in which it was created, to remove such action, in the manner prescribed by the statutes, from the state court to the circuit court of the proper district. But it is further held, that if the foreign corporation is joined with other defendants, who are residents of the state where the suit is brought, the suit cannot be removed under the foregoing statute, from the state to the federal courts, unless such residents are merely nominal parties; and that when the action is against the corporation and its officers, and no relief is prayed for as to such officers, that is not prayed for as against the corporation, and no relief is prayed for against any officer in his individual capacity, such officers are merely nominal parties, and the action may be removed.[2]

[1] Rev. Stat. U. S. (1874), § 639, p. 113.

[2] Hatch v. The Chicago & Rock Island & Pacific R. Co., 6 Blatchf. (C. C.) 105; Ward v. Arredondo, 1 Paine (C. C.), 410; Lathrop v. Union Pacific R. Co., 1 McArthur, 234; Bank of Augusta v. Earle, 13 Pet. 519; Ohio, etc., R. Co. v. Wheeler, 1 Black. 286; The Louisville, etc., R. Co. v. Letson, 2 How. 497; Marshall v. The Baltimore, etc., R. Co., 16 id. 314; The Covington Drawbridge Co. v. Shepherd, 20 id. 232; Wormley v. Wormley, 8 Wheat. 421; Carneal v. Banks, 10 id. 188; Pomeroy v. The New York, etc, R. Co., 4 Blatchf. (C. C.) 120; Hobbs v. The Manhattan Ins. Co., 56 Me. 417.

If the defendant files a proper petition for removal, it is a matter of right and the state court cannot prevent it. Gordon v. Longest, 16 Pet. 97; Carneal v. Banks, 10 Wheat. 188, where parties were made defendants to a suit in equity, who were citizens of the same state with the plaintiff, and there

SEC. 375. Where the declaration described the plaintiffs as an association of persons not incorporated, formed for the purpose of carrying on the banking business, at Omaha, Nebraska, and who were engaged in such business at that place, and the defendants, as a foreign corporation, formed under and created by the laws of the state of New York, and the cause was transferred to the circuit court of the United States; on error, in the supreme court of the United States, it was held, that although there was no direct averment that the suit was between citizens of different states, still it was the necessary consequence of the facts stated that they were so; that the averment that the plaintiffs were a firm of natural persons, associated together at Omaha, and were engaged in the banking business at said place, is equivalent to saying they had their domicile there, as in this country people usually have their domicile where they do business; that this is especially true of persons who are engaged in a business requiring capital and involving risk, at a point remote from the great centers of trade and commerce. And it was further held that the citizenship of the defendant was sufficiently averred; that the obvious meaning of the allegation, that the defendant was a foreign corporation, formed under and created by the state of New York was, that the defendant was a citizen of that state; and that the averments were sufficient to show that the plaintiff and defendant were citizens of different states.

SEC. 376. The opinion of BLATCHFORD, J., in the case of *Hatch v. The Chicago, etc., R. Co.*,[1] furnishes a clear exposition of the law on this subject. He says: "It is settled, by the decisions of the supreme court, that a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in the contemplation of law, and by force of that law;

were defendants, citizens of another state, and it was held that the former might be dismissed as they were improperly made defendants, and that they could not properly affect the jurisdiction of the court as to the parties who were properly before it.

Where the cause of removal is complete, the power of the state court as to the cause is at an end. Hatch v. The Chicago, etc., R. Co., *supra*. See, also, Ward v. Arredondo, 1 Paine (C. C.), 410.

[1] 6 Blatchf. (C. C.) 105 (1868).

that where that law ceases to operate the corporation can have no existence; and that it must dwell in the place of its creation. It is also settled, by like decisions, that a suit against a corporation in its corporate name must be regarded as a suit against citizens of the state which created it, the legal presumption being that its members are citizens of that state, the only state in which the corporate body has a legal existence; and the legal presumption, therefore, being, that a suit against the corporation in its corporate name is a suit against citizens of the state which created it, no averment or evidence to the contrary being admissible to withdraw the suit from any jurisdiction which the court of the United States would otherwise have over it. It follows, therefore, that for the purposes of jurisdiction by the courts of the United States, these suits, so far as they are suits against the company, are suits against citizens of the state which created the company."[1]

SEC. 377. **Rights in court under the national banking law.** — The act of congress of June 3, 1864,[2] relating to national banks, pro-

[1] Hatch v. Chicago, etc., R. Co., *supra*.

[2] The Revised Statutes of the United States (1874), tit. 62, ch. 1, provide as follows:

"Sec. 5133. Associations for carrying on the business of banking under this title may be formed by any number of natural persons not less, in any case, than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the comptroller of the currency, to be filed and preserved in his office.

Sec. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the comptroller of the currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantage of this title.

Sec. 5135. The organization certificate shall be acknowledged before some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the comptroller of the currency, who shall record and carefully preserve the same in his office.

Sec. 5136. Upon duly making and filing articles of association and organization certificate the association shall become, as from the date of the execution of its organization certificate,

vides that corporations shall have power "to sue and be sued, complain and defend, in any court of law or equity, as fully as natural persons." It has been held that when a corporation organized

a body corporate, and as such, and in the name designated in the organization certificate it shall have power:

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchises become forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors, to appoint a president, vice-president, cashier, and other officers; define their duties; require bonds of them and fix the penalty thereof; dismiss such officers, or any of them, at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred; its directors elected or appointed; its officers appointed; its property transferred; its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.

But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking.

Sec. 5137. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due it.

But no such association shall hold the possession of any real estate, under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Sec. 5138. No association shall be organized under this title with a less capital than one hundred thousand dollars; except that with a capital of not less than fifty thousand dollars it may, with the approval of the secretary of the treasury, be organized in any place the population of which does not exceed six thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a less capital than one hundred thousand dollars.

Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Sec. 5140. At least fifty per cent of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum

under this act has been brought as suitor into a court which has jurisdiction of the suit, it has the same *status*, in respect to its own rights or the rights of others against it, as a natural person; and that the presumption is that the members of a banking corporation organized under such act are citizens of the state in which such corporation is located, in all cases where jurisdiction of the court depends upon citizenship; and that the district court of the United States has jurisdiction of a suit brought against an inhabitant of the district by a national bank located in another state.

SEC. 378. In a recent case under this act, on the question of citizenship, BLACKFORD, J., after referring to various provisions of the banking act, observes: "It is quite apparent from all these statutory provisions, that congress regards a national banking association as being located at the place specified in its organization certificate. If such place is a place in a state, the association is located in the state. It is indeed at but one place in the state; but when it is so located it is regarded as located in the state. The requirement that at least three-fourths of its directors of the association shall be residents, during their continuance in office, in the state in which the association is located, especially indicates an intention on the part of congress to regard the association as belonging to the state. * * * Where a corporation is created by competent authority — authority as competent, within a given state, to create such corporation and to locate it within such state, as is the state itself, and a location and *habitat*, within such state and not elsewhere, is given by the creating authority to such corporation, there is no reason why the legal presumption should not be, that the members of such corporation are citizens of such state, within the meaning of the second section of the third article of the constitution, and the eleventh section of the judiciary act of 1789. The presumption in the case of a corporation created by a state is only arrived at by presuming the mem-

each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the comptroller of the currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association."

bers of the corporation to be citizens of the United States, and to be residents in the state, and therefore, under the decision in *Gassies* v. *Ballon*,[1] citizens of the state."[2]

It seems, therefore, from the foregoing, that a corporation is a citizen of the state where it is created, in the sense in which it is used in that part of the constitution of the United States which refers to the judicial powers of her courts; and also in the statutes of the United States providing for the jurisdiction of the circuit courts, as well as the statutes providing for the removal of causes from a state court to the circuit court of the United States, of the district where the suit is instituted; and that the same doctrine as to citizenship applies under the statute relating to the national banking law.

SEC. 380. Where a corporation is created by the laws of one of the states, or under general laws provided therefor, or under the statutes of the United States, where, by the provisions of the statutes, they have a location within one of the states, this constitutes the corporation a citizen of the state where created, within the meaning of the constitution and the judiciary act, and the statutes providing for the removal of a suit from the state court to the circuit court of the United States; and it will be conclusively presumed that the members of such a corporation are citizens of the state where such corporation is located.[3]

SEC. 381. **Parties to a suit.** — It is evident that where a corporation is a party to a suit the other parties should usually be the same as though all were natural persons. But neither the bondholders nor the stockholders of a corporation are necessary parties to a creditor's bill seeking to subject assets of the corporation to the

[1] 6 Pet. 761.

[2] Manufacturers' National Bank *v.* Baach, Blatchf. (C. C.); 1 With. Corp. Cas. 93; Marshall *v.* Baltimore, etc., R. Co., 21 How. 314.

[3] The Commonwealth of Pennsylvania *v.* The Quicksilver Mining Co., 10 Wall. 553; The Insurance Companies *v.* The Commonwealth, 5 Bush (Ky.), 68; Ducat *v.* The City of Chicago, 10 Wall. 410; S. C., 48 Ill. 172; The Liverpool Ins. Co. *v.* The Commonwealth of Mass., 10 Wall. 566 (1870); The State of Louisiana *v.* Fordick, 21 La. Ann. 434. And it may bring suits in the courts of any other state. Park Bank *v.* Nichols, 4 Biss. 315; Insurance Company *v.* The C. D., Jr., 1 Woods, 73 (1874).

payment of debts, where they are represented by other parties before the court.[1]

And where the property of a corporation was conveyed to trustees to secure the payment of debts, and it was sold without judicial proceedings, in the execution of a power attempted to be conferred by the terms of the deed, but which was invalid because of a statute requiring that all such sales should be made by proceedings in court, it was held, first, that the purchaser was answerable for the proceeds of the property; second, that the corporation was a necessary party to any proceeding for its recovery.[2] So, also, where two directors of a corporation instituted an action against the corporation and a preferred stockholder and another director, to prevent the preferred stockholder from suing the corporation for an accounting and for dividends, it was held that the plaintiff could not maintain the action; that the right to the relief sought could be determined in the suit by the preferred stockholder; that the defendants were improperly joined, they having no community of interest; and that, if such action was maintainable at all, the corporation only could maintain it.[3]

SEC. 382. **Process.** — In considering the capacity and incident of a corporation to sue and be sued, it is proper also to notice the general principles relating to process, pleadings, and evidence in such suits. In relation to process, it may be observed that, in modern practice, it is the same as though the parties were natural persons. The statutes of the various states generally, if not universally, provide what the original process shall contain, and how it shall be served, not only on natural persons but on copartnerships and corporations. And jurisdiction of the person is usually secured in case of a corporation, by the service of the process on

[1] The Chicago, etc., R. Co. *v.* Howard, 7 Wall. 392; S. C., 1 With. Corp. Cas. 1.

[2] Samuel *v.* Holladay, 1 Woolw. (C. C.) 400; S. C., 1 With. Corp. Cas. 139. In this case the court also held that where proceedings were instituted by the stockholders in behalf of themselves and all others who might come in and take part in the litigation, and it appeared that the bill had been pending six years without service on the corporation; that if the suit should be successful the property would be absorbed in the payment of debts, leaving nothing to be distributed among its stockholders, and that the interest of the plaintiffs, by reason of the small amount of stock held by them, was merely nominal, they would not order the cause to stand over for service on the corporation Id.

[3] Gould *v.* Thompson, 39 How. Pr. 5.

some officer in the same manner as though it were a natural person. Statutes usually provide that the original process against a private corporation may be served in the usual way of service, on the president or other officer, or on any general agent of such corporation, or upon some local agent of the corporation, within the jurisdiction of the court where the suit is brought; especially is the latter the case if the suit relates to matters growing out of or connected with the business of the office or agency.[1]

SEC. 383. **Pleadings.** — In relation to pleadings, also, they are generally required to be the same, in most if not all respects, as though the parties to the suit were natural persons, and the sufficiency of them must be adjudged as in ordinary cases between individuals. But in certain proceedings, owing to the peculiar character of the corporate body, and the extent or limit of the duties and powers of the corporation dependent upon the charter or act under which it is instituted, matters may be required to be pleaded that would have no pertinence except that a corporation was a party. Thus, in an action by a foreign corporation, for an alleged libel against it, on demurrer to the declaration, it was held that the charter should be set out at length, in order that it might be seen whether the publication was false in stating the mode in which it authorized the business of the company to be done, and which was the subject of the criticism which constituted the alleged libel.

On this question, Mr. Justice LAWRENCE, who delivered the opinion of the supreme court of Illinois, observed: "It would be clearly against public policy to treat as libelous an article which merely assumes that an insurance corporation proposes to do for its own advantage, or that of its stockholders, whatever its charter may expressly authorize it to do. If a charter is obtained by any

[1] Code of Iowa (1873), §§ 2611–2613. As to service upon an agent, under the statutes of Illinois (1853), see St. Louis, etc., R. Co. v. Dorsey, 47 Ill. 288.

It must appear, in order to sustain a default against a corporation, that service of the requisite process and papers was made upon some person occupying a relation to the corporation that they could legally serve upon such person. Oxford Iron Co. v. Spradley, 42 Ala. 24; Talladega Ins. Co. v. McCullough, id. 667.

And where the statute provided for service of original notice, in certain cases, upon an agent or clerk, it was held that a service made upon a baggage-master, or hack-master, would not be a good service. Richardson & Co. v. The Burlington, etc., R. Co., 8 Ia. 260; 8 How. Pr. 308.

corporation which seeks to secure for its own emoluments the control of the money of individuals, it is proper to call the attention of the public to its provisions, and to take it for granted that the incorporation proposes to avail itself of whatever privileges, in dealing with the public, it has induced the legislature to bestow. A free criticism of the character of an insurance company, or of any other incorporation which claims the confidence of the public, and seeks the possession of its funds, is to be encouraged rather than repressed, as a means of public security; and if an insurance company has procured a charter which authorizes it to pay an interest of thirty per cent per annum to its stockholders, before laying by a fund for the security of its policyholders, we certainly cannot hold a publication libelous, merely because it assumes that the company will do for the profit of its stockholders, that which it has obtained an express power to do; and because it argues that a company, organized under such a charter, must necessarily be unworthy of public confidence. This brings us to the precise question upon this record, namely: Does the charter of this company authorize it to do what the publication says it proposes to do? If it does, the publication cannot be considered libelous. It would be merely a just criticism upon an objectionable charter, and a proper caution to the public against trusting its money to a corporation which has obtained a legislative right so to use that money as necessarily to make the public insecure. If the charter contains no such authority, and the company does not propose to do its business in that method, the publication may be libelous. Herein contains the fatal defect in the declaration. It nowhere purports to set out the charter, either in substance or in *haec verba*. * * * The plaintiff should have set out the charter at length, that the court might determine whether the publication was false in stating the mode in which it authorized the business of the company to be done. The declaration, it is true, has the usual formula, to the effect that the defendant falsely and maliciously wrote, published, etc., but in a case of this character it is not sufficient."[1]

SEC. 384. As a general rule, it is not necessary for a corporation plaintiff to set forth in its declaration the articles, or act of

[1] The Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87; S. C., 1 With. Corp. Cas. 420.

incorporation, if it be a private one; it is sufficient to aver the fact and prove the same on the trial if it is controverted. [1]

SEC. 385. **When party is estopped to deny the corporate existence.**—When the action is brought by the corporation, on a contract executed by the defendant to it, the general rule is that the plaintiff need not aver or prove the corporate existence, and the defendant is estopped from denying it, in the absence of fraud on the part of the corporation.[2] But where there is fraud, on the part of the corporation, in obtaining the contract, the party contracting with it is not estopped from denying its corporate existence.[3] Thus, where a bill in chancery was filed to set aside a conveyance of real estate, alleged to have been obtained by fraud and misrepresentation of the corporation, it was held that with proper averments the fact whether said corporation ever had a corporate existence, so as to enable it in its corporate capacity and name to take and hold property, might be inquired into; that if a company professing to have a corporate existence, which it in fact does not possess, acquires property for a particular purpose in its corporate name, and conveys it to another, the sufficiency of such conveyance or transfer may be inquired into collaterally.[4] And where a party is estopped from denying the existence of the corporation, at the time he recognized it as such, if he denies its existence subsequently, he must show how it ceased to exist.[5] But it is held that a contractor with a corpora-

[1] Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787; California Navigation Co. *v.* Wright, 6 Cal. 258; Frye *v.* Bank of Illinois, 10 Ill. 332; Spangler *v.* Indiana, etc., R. Co., 21 id. 276; Heaston *v.* Cincinnati, etc., R. Co., 16 Ind. 275; United States *v.* Haskins, 1 Johns. Cas. 133; Utica Bank *v.* Smalley, 2 Cow. 770; Dutchess Cotton Man. *v.* Davis, 14 Johns. 245; Bank of Michigan *v.* Williams, 5 Wend. 482; Grays *v.* Turnpike Co., 4 Rand. 578.

[2] Dutchess Cotton Manuf. Co. *v.* Davis, 14 Johns. 245; Hamtramck *v.* Edwardsville, 2 Mo. 169; Hughes *v.* Bank of Somerset, 5 Litt. (Ky.) 47; Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315; Tar River Nav. Co. *v.* Neal, 3 Hawk. (N. C.) 520; Bennington Iron Co. *v.* Rutherford, 18 N. J. L. 105; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146; Harrison *v.* Muskingum Manuf. Co., 4 id. 267; Zion Church *v.* St. Peter's Church, 5 Watts & S. 215; Lighte *v.* Everett Ins. Co., 5 Bosw. 716; Union Mut. Ins. Co. *v.* Osgood, 1 Duer, 707; Kennedy *v.* Cotton, 28 Barb. 59; Layfayette Ins. Co. *v.* Rogers, 30 id. 491; Phenix Bank *v.* Donnell, 41 id. 571; Acome *v.* Am. Min. Co., 11 How. Pr. 24; Shoe and Leather Bank *v.* Brown, 9 Abb. Pr. 218; Howe Machine Co. *v.* Snow, 32 Ia. 433.

[3] Stoops *v.* Greensburgh, etc., R. Co., 10 Ind. 47; Ensey *v.* Cleveland, etc., R. Co., id. 178; Fort Wayne Turnpike Co. *v.* Deam, id. 563.

[4] Carey *v.* The Cincinnati, etc., R. Co., 5 Ia. 357.

[5] Ensey *v.* Cleveland, etc., R. Co., 10 Ind. 178; Fort Wayne Turnpike Co. *v.* Deam, *supra*.

tion is estopped from setting up a fraudulent organization of the corporation in defense of a suit brought by the company against him.[1]

SEC. 386. **When the corporation is estopped from denying its corporate existence.**—It is also a general doctrine, founded upon principles of justice and equity, that a corporation, dealing with others as such, is estopped from denying its corporate existence,[2] and this rule has become a matter of statutory regulation and adoption in various states.[3]

SEC. 387. **General denial.**—At common law it was well settled that if, in a suit brought by a corporation, the defendant plead to the merits, he admitted the capacity of the defendant to sue; and that if he merely made a general issue, it dispensed with the necessity of all proof of corporate existence and of their right to sue.[4]

[1] State *v.* Bailey, 16 Ind. 46; Jones *v.* Cincinnati, etc., R. Co., 14 id. 89; Hubbard *v.* Chappel, id. 601; Evansville, etc., R. Co. *v.* Evansville, 15 id. 395; Meikel *v.* German Savings, etc., Soc., 16 id. 181; Brownlee *v.* Ohio, etc., R. Co., 18 id. 68; Commissioners *v.* Bright, id. 93; Washington College *v.* Duke, 14 Ia. 14; Hamtramck *v.* Bank of Edwardsville, 2 Mo. 169; Camp *v.* Byrne, 41 id. 525; Congregational Soc. *v.* Perry, 6 N. H. 164; Cochran *v.* Arnold, 58 Pa. St. 399.

Neither can it be shown in defense of an action by a corporation that it has forfeited its rights by misuser or nonuser, as it is the privilege of the state only in such cases to secure a judgment of forfeiture by direct proceedings for that purpose. Cochran *v.* Arnold, 58 Pa. St. 399; Center Turnpike Co. *v.* McConaby, 16 S. & R. 140; Lehigh Br. Co. *v.* Lehigh Coal Co., 4 Rawle, 9; Chester Glass Co. *v.* Dewey, 16 Mass. 102; Searsburgh Turnpike Co. *v.* Cutler, 6 Vt. 315; Union Branch R. Co. *v.* East Tenn. R. Co., 14 Ga. 327; Cleveland R. Co. *v.* Erie, 27 Pa. St. 380.

And a payment of a portion of subscription to the stock of a corporation is sufficient to estop the subscribers from denying the corporate existence in an action to recover the balance. Maltby *v.* North Western R. Co., 16 Md. 422; Black River R. Co. *v.* Clarke, 25 N. Y. 208.

[2] Dooley *v.* Cheshire Glass Co., 15 Gray, 494; Merrick *v.* Reynolds Engine Co., 101 Mass. 385; Ang. & Am. on Corp., § 636.

[3] The Code of Iowa, tit. 9, ch. 1, § 1089, provides: "No body of men acting as a corporation under the provisions of this chapter [relating to corporations], shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation; nor shall any person sued on a contract made with such a corporation, or sued for an injury to its property, or a wrong done to its interests be permitted to set up a want of such legal organization in his defense."

[4] Alderman *v.* Finley, 10 Ark. 423; Teaton *v.* Lynn, 5 Pet. 231; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443; Phenix Bank *v.* Curtis, 14 Conn. 437; Railsback *v.* Liberty, etc., Turnpike Co., 2 Ind. 656; Jones *v.* Cincinnati, etc., R. Co., 14 id. 89; Hardy *v.* Merriweather, id. 203; Hubbard *v.* Chappel, id. 601; Harrison *v.* Martinsville, etc., R. Co., 16 id. 505; Carpenter *v.* Mercantile Bank, 17 id. 253; Commissioners *v.* Bright, 18 id. 93; Penobscot Boom Co. *v.* Lamson, 16 Me. 224; Savage Manuf. Co. *v.* Armstrong, 17 id. 34; Putnam Free School *v.* Fisher, 30 id.

This was, however, held not to apply in case of a foreign corporation.[1]

SEC. 388. **Proof of incorporation.**—Where, in other cases, it becomes necessary to prove an incorporation this may be done by an exemplification of the act under which it was constituted or authorized, and proof of the acceptance of its provisions. This proof of acceptance may be shown by the direct action of the corporators, as shown by the records of the corporation, or by acts of user under it. We have already considered what acts of corporations will be considered as an acceptance of a charter or act of incorporation.[2] General statutes relating to incorporation may be proved like any other public and general statutes published by authority of the legislature, and *prima facie*, it is sufficient to show that the book containing such statutes purports to have been printed by public authority; for it is almost if not the universal course for the legislatures of the various states as well as the congress of the United States, to have the laws and resolutions of each session of them printed by authorized parties; and it is also usually provided by them, that certain competent persons shall compare the copies to be published as authority, with the original enrolled acts of the legislature or of congress, as the case may be, and it is but reasonable that general laws and statutes so purporting to be printed, should, at least, be received as *prima facie* evidence that they are authorized and correct.

SEC. 389. It is proper to say that the private corporations in this country are almost invariably created under such general laws, and that under the provisions of the same it would ordinarily be necessary only to prove that the corporators had complied with the statutes in that respect. This may generally be shown by the original articles of incorporation, signed by the original persons

523; Roxbury v. Huston, 37 id. 42; People v. Turnpike & Bridge Co., 20 Barb. 518; Orono v. Wedgewood, 44 Me. 49; Rheem v. Naugatuck Wheel Co., 33 Pa. St. 356; Bank of the Metropolis v. Orme, 3 Gill. 443; Whittington v. Farmers' Bank, 5 Harr. & J. 489; Methodist Episcopal Church of Cincinnati v. Wood, 5 Ohio, 286.

[1] Henriques v. Dutch W. I. Co., 2 Ld. Raym. 1535; School District, etc., v. Blaisdell, 6 id. 198. See, also, Lewis v. Bank of Ky., 12 Ohio, 132; United States Bank v. Stearns, 15 Wend. 314; Bank of Mich. v. Williams, 5 id. 482.

[2] See *ante*, § 28 *et seq.*

desiring to organize a corporation, and which is usually required to be filed and recorded in some one or more public offices, or by a copy or transcript of the same duly authenticated by the proper officer, having charge of the records of the original articles or certificate of incorporation.[1]

SEC. 390. We have already considered, to some extent, what constitutes an acceptance of a charter of incorporation under a special or under general acts.[2]

SEC. 391. **Corporate records.**—The organization of a corporation is of course a matter which may be proved by its records.[3] The acts of a corporation may, as we have seen, furnish evidence of acceptance of a corporate charter, or the provisions of a general

[1] Printed copies of legislative acts and of reports of the decisions of the courts, purporting to be published by authority, are sufficient *prima facie* evidence of the matters found therein, and that the publication is authorized. Young *v.* Bank of Alexandria, 4 Cranch, 388; Biddis *v.* James, 6 Binn. 321; Eld *v.* Gorham, 20 Conn. 8; Watkins *v.* Holman, 16 Pet. 25. Acts of incorporation were by the statutes of Massachusetts to be deemed public statutes, and may be given in evidence without specially pleading the same. Rev. St., ch. 2, § 3. And in Ohio it is enacted that in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to the statute by its title and the day of its passage, and the court shall thereupon take judicial notice of the same. Rev. Stat. by Curwin (1854), vol. 3, p. 1956. The acts printed by the king's printers are always good evidence to a jury, though they may not be good evidence upon an issue of *nul tiel record.* Anon., 2 Seld. 566, opinion by HOLT, C. J. The laws revised and adopted by the territorial legislature of Michigan in 1827, were the statutes previously printed. It was held that the printed book containing these statutes was the best evidence of what the statute was, and that the original record of the statutes was not admissible in evidence to show that the revision was incorrect, especially where the alleged error is not discovered for a long time, and the statute, as printed, has been treated and considered as the actual law. Pease *v.* Peck, 18 How. (U. S.) 595.

An act of congress, approved June 20, 1874, providing for the publication of the Revised Statutes and the laws of the United States, is as follows:

"SEC. 2. That the Secretary of State is hereby charged with the duty of causing to be prepared for printing, publication and distribution, the Revised Statutes of the United States, enacted at this present session of congress; that he shall cause to be completed the head notes of the several titles and chapters, and the marginal notes referring to the statutes from which each section was compiled and repealed by said revision, and references to the decisions of the courts of the United States, explaining or expounding the same, and such decisions of the state courts as he may deem expedient, with a full and complete index to the same. And when the same shall be completed, the said secretary shall duly certify the same under the seal of the United States, and when printed and promulgated, as hereinafter provided, the printed volume shall be legal evidence of the laws and treaties therein contained in all courts of the United States and of the several states and territories."

[2] See *ante*, § 28 *et seq.*

[3] Duke *v.* Cahawba Nav. Co., 10 Ala. 82.

act for incorporating, and the intention in this respect, as well as the positive and direct acceptance by the will of the corporation, may be most satisfactorily shown by its records, for neither the private views nor the public declarations of individual members of the corporation can, as a general rule, furnish evidence of this fact or of any corporate act.[1] But the unrecorded acts of a corporation, or of the directors, may sometimes be proved by parol, unless otherwise provided in the charter.[2] And omissions in the corporate minutes may also be supplied by parol testimony.[3] And where, on a proceeding for a *mandamus* to compel a defendant to deliver up to the relators certain account books of the corporators, it appeared that the defendant had acted as secretary of the relators about two months; that he had in his possession books, in one of which he had written the minutes of the proceedings of the meeting of the corporators, and of the stockholders and directors, and in another were contained the signatures of the subscribers to the capital and the receipts of the relators, but that each of these books was purchased with the defendant's own money, it was held that the books were the property of the relators, and were so as soon as the defendant, as secretary, began to put in them the records of the relators; that the defendant's possession was the possession of the company, and that when he ceased to be secretary he had no right to withhold the books from the relators.[4] And neither the bond nor stockholders of a corporation are necessary parties to a creditor's bill seeking to subject assets to the payment of debts, where they are represented by the parties before the court.[5]

SEC. 392. It is evident that the records of corporations may be important, many times, as evidence both for and against them. On the subject of such evidence, Prof. Greenleaf remarks: "There are other records which partake both of a public and private character, and are treated as one or the other, according to the relation in which the applicant stands to them. Thus, the

[1] Bartlett v. Kinsley, 15 Conn. 327.

[2] Langsdale v. Bonton, 12 Ind. 467.

[3] Vicksburgh Co. v. Ouchita, 11 La. Ann. 649.

[4] State v. Goll, 32 N. J. L. 285.

[5] The Chicago, etc., R. Co. v. Howard, 7 Wall. 392; Bagshaw v. Railway Co., 7 Hare, 131; Holyoke Bank v. Manufacturing Co., 9 Cush. 576; Hall v. Railroad, 21 L. R. 138; 1 Redf. on Railways, 578; Boon v. Chiles, 8 Pet. 532; Story v. Livingston, 13 id. 359.

books of a corporation are public with respect to its members, but private with respect to strangers.[1] In regard to its members, a rule for inspection of the writings of corporations will be granted, of course, on their application, where such inspection is shown to be necessary in regard to some particular matter in dispute, or where the granting of it is necessary to prevent the applicant from suffering injury, or to enable him to perform his duties; and the inspection will then be granted, only so far as is shown to be essential to that end.[2] But a stranger has no right to such rule, and it will not be granted, even where he is defendant in a suit brought by a corporation.[3]" In this class of records are enumerated "parish books, transfer books of the East India Company, public lottery books, the books of incorporated banking companies, a bishop's registry of presentations and some others of the like kind."[4]

SEC. 393. **Stockholder's rights in equity.** — To warrant a stockholder to institute a suit in equity in his own name, against a wrong-doer whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their stock, application must first have been made to the directors of the company to institute a suit in its own name, and they must have refused. Such refusal is essential to give the stockholder any standing in court, in case the charter confers upon the directors the general management of the business of the company.[5] But we shall, in the following chapter, consider the subject of suits in equity by and against corporations and other parties.

[1] Greenleaf on Ev. 116.

[2] Rex v. Merchant Tailors' Co., 2 B. & Ald. 115; The People v. Throop, 12 Wend. 183.

[3] 1 Greenl. Ev., § 474. See, also, Bank of Utica v. Hillard, 5 Cow. 419; S. C., 6 id. 62; Imperial Gas Co. v. Clarke, 7 Bing. 95; Rex v. Justice of Buckingham, 8 B. & C. 375.

[4] Geery v. Hopkins, 2 Ld. Raym. 851; S. C., 7 Mod. 129; Shelling v. Farmer, 1 Str. 646; Brace v. Ormond, 1 Merv. 409; Union Bank v. Knapp, 3 Pick. 96; McKavlin v. Bresslin, 8 Gray, 177; Mortimer v. McCallan, 6 M. & W. 58; Rex v. Bp. of Ely, 8 B. & C. 112; Finch v. Same, 2 M. & Ry. 127.

[5] Memphis v. Dean, 8 Wall. 64; 18 How. 331.

CHAPTER XIV.

SUITS IN EQUITY BY AND AGAINST CORPORATIONS AND DIRECTORS.

SEC. 395. **Remedy in equity by and against corporations.**—We have already treated of suits at law by and against private corporations as a common-law incident, and shown where, under our laws and the federal constitution, the suits may be brought; the rights of corporations as citizens; their rights in court under the national banking law; the proper parties to such suits; and referred to the subject of parties, process, pleadings, evidence, etc., in connection therewith. But we propose in this chapter to discuss those remedies in equity which parties may possess, growing out of their relations with corporations. It will be evident that the mere legal abstract rights of parties, as frequently stated in the books, would be of little consequence were it not for provisions made to secure the enforcement of them. Hence the maxim, "that wherever the law gives any thing to a person it also gives a remedy for an injury thereto; *lex semper debet remedium;* that there is no wrong without a remedy; *ubi jus ibi remedium.* If a person has a right, he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it."[1]

[1] Field on Dam., §§ 2-3, and notes.

SEC. 396. **Rights, liabilities and remedies of various parties.**—From what has already been said it will be apparent that not only the corporation has a right to sue and is subject to suit by members and other persons, whose rights may be infringed by it, but also that other parties related to the corporation as director, stockholder, bondholder, trustee, or creditor may have rights and be subject to liabilities growing out of the corporate relation, which requires a particular consideration.

SEC. 397. **Rights and liabilities of, and remedies against, directors.**—It must be apparent that one of the most important relations with private corporations for pecuniary profit is that of directors. They usually have, under the constating instruments, full power in most if not all respects, to act for, if not as, the corporate body, and to control and manage all the corporate business. Hence, this authority cannot be controlled, nor their rights in this respect infringed by the corporation. If the constating instruments have conferred on the directors the power to control and manage the corporate affairs, the corporate body have no right to interfere with this management, nor can a majority of the corporators require the board of directors to act in matters left to their discretion, contrary to their judgment.[1]

On the other hand, the directors are the primary agents of the corporation, and, as we have already noticed,[2] the relation of trustee and *cestui que trust* may, and usually does, exist between them on the stock and bondholders and creditors, and the fiduciary character of this relation requires of them the highest and most scrupulous good faith in their transactions for the corporation and these stock and bondholders and creditors. "The company have a right to the services of their directors whom they remunerate by considerable payments; they have a right to their entire services; they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration, and the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater

[1] Dana *v.* Bank of the U. S., 5 W. & S. 247; Commonwealth *v.* St. Mary's Church, 6 S. & R. 508; Conro *v.* Port Henry Iron Co., 12 Barb. 27; State *v.* Bank of La., 6 La. 745.

[2] See ch. 6.

force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance."[1]

SEC. 398. One of the most effectual remedies in such cases is by injunction to restrain the unlawful acts of the directors, or in case of the proposed execution of a contract ultra vires, to restrain the execution of the same by the directors as the agents of the corporation. A shareholder may

[1] Lord Chancellor HATHERLEY in Imperial, etc., Association *v.* Coleman, L. R., 6 Ch. 567. See, also, Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477; *ante,* § 169 *et seq.;* Dodge *v.* Woolsey, 18 How. (U. S.) 331. In the case last cited the plaintiff was a stockholder in a bank incorporated and doing business in the state of Ohio. The defendant, a collector, was about to collect by distress certain illegal taxes from the bank, and the plaintiff requested the bank to take legal steps to prevent this proceeding, which it refused to do. The supreme court of the United States on these facts held that the plaintiff could maintain his suit against the collector for an injunction, the bank being made a party.

In Samuel *v.* Holladay, 1 Woolw. (U. S. C. C.) 400, Justice MILLER, in commenting on this decision, observes: "I think I am correct in stating that the propositions supposed by the court to be established by this examination may be stated thus:

"1. That in the case of an incorporated company with a capital stock divided into shares and held by individuals the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.

"2. When the directors of a corporation have misapplied a portion of its funds to which a shareholder has a distinct right, as, for instance, a dividend, he may in an action recover the amount misapplied, and when such misapplication has not been effected, but is threatened, he may, by bill in equity for an injunction, prevent it.

"3. When a corporation or its rights of property are threatened with an injury of such a nature as the court will enjoin, but it refuses to take any legal steps to protect itself, a stockholder may maintain a bill in equity against the party threatening the mischief and the corporation, to restrain by injunction the commission of the act, in order thereby to protect his interest from immediate danger.

"But no case is cited, nor does any dictum in the opinion of the court go to the length of asserting, that when a corporation has been injured by a tort or a breach of a contract, or has any right of action, legal or equitable, against a party, an individual shareholder can come into court and prosecute that cause of action because the corporation fails or refuses so to do. * * *

"Again, the court says, that the jurisdiction at the instance of a shareholder is to apply preventive remedies, by injunction, to restrain those who administer the affairs of the corporation from doing acts which would amount to a violation of the charter, etc. It also extends to inquiring concerning, and enjoining, as the case may require, individuals, in whatever character they may assume to act, from prosecuting any course of conduct which is in violation of a corporate franchise, or in denial of a right growing out of it, when, for the injury which will result, there is no adequate remedy at law. Whe see here, that where other parties are concerned, the jurisdiction is limited to cases in which the preventive remedies are efficient for the protection of rights endangered by the neglect of the directors, and the threatened aggressions of others. It would be a doctrine attended with very serious consequences if every individual shareholder, assuming the place of the corporation, could decide for it when actions should be brought to vindicate its supposed right."

restrain any mismanagement on the part of directors of a corporation as for a misappropriation of the corporate funds.[1] And he may commence an action in equity for himself, and all others having a common interest with him, to restrain unlawful acts of the directors by injunction, or to require such parties to account for funds of such corporation, which have been misappropriated by such directors to their own use, even though such action may be opposed by all the other stockholders.[2] For although the general doctrine is that the corporation is the proper party to institute a suit for an injury to corporate rights, and to protect the stockholders, yet where the corporation refuses to sue, and the interests of a stockholder require it, or where the wrong is done by the directors, who are the primary agents, and may in some cases be considered, so far as their acts are concerned, as the corporation itself, or at least as having control of the corporate interests, a stockholder may, in case of their refusal to act, or in some cases without such refusal, as we shall hereafter notice, institute a suit on behalf of himself and of all other stockholders, where the protection of their rights require it, but in which case it would usually be proper, if not necessary, to make the corporation itself a defendant.[3]

[1] Kean v. Johnson, 1 Stockt. 401; Simpson v. Westminster, etc., R. Co., 8 H. L. 717; Ernest v. Nicholls, 6 id. 401.

[2] On this subject it is observed by the court in Dodge v. Woolsey, 18 How. (U. S.) 331, as follows: "It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders or the value of their shares; as either may be practiced by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust, and the jurisdiction extends to inquiry into and to enjoin, as the case may require, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an implied violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."

See, also, Davenport v. Dower, 18 Wall. 626; Hersey v. Veazie, 24 Me. 9; Smith v. Hurd, 12 Metc. 371; Allen v. Curtis, 26 Conn. 456; Western R. Co. v. Nolan, 48 N. Y. 513; March v. Eastern R. Co., 40 N. H. 548; Same v. Same, 43 id. 515; Lauman v. Lebanon, 30 Pa. St. 46.

[3] See Dodge v. Woolsey, 18 How. 331; Samuel v. Holladay, 1 Woolw. 400; Heath v. Erie R. Co., 8 Blatchf. 347; Brewer v. Proprietors, etc., 104 Mass. 378; Brown v. Vandyke, 4 Halst. Ch. 795; Butts v. Woods, 38 Barb. 181; S. C., 37 N. Y. 317; Green's Brice's Ultra Vires, 183, where it is said: "They — the members complaining — cannot bring a suit either individually or as a class, or in the name of some one or more on behalf of themselves, etc., unless, indeed, the corporation —

SEC. 399. On this subject Mr. High, in his valuable work on Injunctions, observes: "The protection of the rights of shareholders in incorporated companies against the improper and illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule that courts of equity will enjoin, on behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises, as well as the improper management of the business of the company, or a wrongful diversion of its funds. And in such a case equity will grant relief at the suit of a single stockholder."[1]

that is to say, a majority — are acting fraudulently toward the members complaining, by refusing to institute the necessary proceedings." Citing Atwool v. Merryweather, L. R., 5 Eq. 464, n.

[1] High on Inj., § 767. See, also, *ante*, § 172 *et seq.*, and § 245; Kean v. Johnson, 1 Stockt. 401; Manderson v. Commercial Bank, etc., 28 Pa. St. 379; Sears v. Hotchkiss, 25 Conn. 171; Bagshaw v. Eastern, etc., R. Co., 7 Hare, 114; Colman v. Same, 10 Beav. 1; Central, etc., R. Co. v. Collins, 40 Ga. 582; Simpson v. Westminster, etc., 8 H. L. 717; Gifford v. New Jersey, etc., 2 Stockt. 171.

It was held in Heath v. Erie R. Co., 8 Blatchf. 347, that where the acts complained of are ultra vires, application to and a refusal of the directors to institute a suit is not essential in order to authorize a suit by a stockholder. In this case it is said: "Now so far as the bill sets out acts ultra vires, in issuing stock, and breaches of trust, which are frauds on the stockholders, such acts and breaches of trust are beyond the power of the corporation or its directors to affirm, or sanction, or make good; and in such case, the authorities agree, that the reason for the rule for an application to the corporation, or its board of directors, to bring the suit does not exist. Such reason is, that while the stockholder is prosecuting his suit, the corporation, through its board of directors, may affirm and make good the acts complained of. But the rule ceases when the reason ceases."

In French v. Gifford, 30 Ia. 148, DAY, J., observes: "The doctrine best sustained by authority, and most in consonance with reason and justice, seems to be, that courts of equity, aside from statutory provisions, do not exercise a jurisdiction over a corporation as over a partnership, to dissolve it and distribute its assets; but that it will afford a stockholder relief from the malfeasance of those intrusted with the management of the corporate business."

Again, in Wright v. Oroville M. Co., 40 Cal. 20, the court say: "The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted at least with a view to advance the interest of the stockholders, and not with a purpose to injure and destroy that interest; and it is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts, when done, would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred."

SEC. 400. In case, also, of an attempt on the part of the majority of the stockholders, some of whom are directors, to unlawfully divest the corporation of its funds, or to fraudulently mismanage the business, a minority or undoubtedly a single stockholder would be entitled to an injunction to prevent the same, provided he is diligent in the assertion of the right.[1] And it seems now generally conceded, both in this country and in England, that any stockholder is entitled to an injunction to prevent a violation of a corporate franchise; and that he may also maintain a bill in equity against the directors, and compel the company to refund any of the profits improperly applied.[2]

SEC. 401. **Stockholder's liability in equity.** — We have already noticed that the stockholders of a corporation are liable in equity to account for dividends received on shares of capital stock, where creditors remain unpaid.[3] The doctrine on this subject now universally recognized is, that the stockholders are not entitled to dividends of profits upon the capital stock, where there are existing creditors of the corporation; and that such creditors may, in equity, pursue the consideration in the hands of the stockholders, and compel them to contribute *pro rata* toward the payment of the claims of creditors, out of the money or property so received.[4]

SEC. 402. **Right of stockholders to restrain acts ultra vires.** — The right of stockholders to restrain, not only the directors, but the corporation as a body, from acts ultra vires, is generally recognized. For although either the corporation or body of directors may, unless restrained by the constating instruments, manage the affairs of the corporation as they please, so long as they act *bona fide*, and within the powers conferred upon them, still, if they

[1] High on Inj., § 768; Manderson *v.* Commercial, etc., 28 Pa. St. 379; Sears *v.* Hotchkiss, 25 Conn. 171, where it was held that the fact that a remedy at law exists by an action on behalf of the corporation or of the aggrieved stockholders, against the wrong-doers, constitutes no bar to an injunction in such a case.

[2] Dodge *v.* Woolsey, 18 How. 331; Samuel *v.* Holladay, 1 Woolw. 400. See, also, Walker *v.* Devereaux, 4 Paige, 229.

[3] See *post*, § 403.

[4] Story's Eq. Jur. (9th ed.), § 1252; Mumma *v.* Potomac Co., 8 Pet. 286; Wood *v.* Dummer, 3 Mason, 308; Vose *v.* Grant, 15 Mass. 522; Spear *v.* Grant, 16 id. 14; Curran *v.* Arkansas, 15 How. 307; Railroad Company *v.* Howard, 7 Wall. 392.

attempt to exceed such powers, they may be restrained at the suit of a stockholder or creditor.[1]

Thus where the officers of a bank do acts contrary to law, and especially if it endangers the rights of the corporation under the charter; or, where the majority of the stockholders attempt to fraudulently mismanage the business or divert the funds from the legitimate purposes for which the corporation was created, a stockholder may ask the aid of a court of equity and enjoin such acts.[2] As to every act which is ultra vires, any stockholder has a right to restrain and to prevent a repetition of it, though every other member may be arrayed against him.[3]

"It is a settled rule of equity law," observes Mr. Redfield, "that a majority of the shareholders in a joint-stock corporation may maintain a suit to restrain the directors of the company, or a majority of the shareholders, from entering into a stipulation whereby the business of the company is changed and directed into channels and enterprises wholly diverse from those originally contemplated and entered upon, and from which their emoluments had been derived. But the court will not interfere to enjoin the majority of the shareholders from applying surplus funds in the hands of the corporation to an extension of the business within its powers, because a minority dissent from such extension. So, also, the court will not enjoin the majority of the shareholders from extending the business of the corporation to kindred enterprises, beyond those contemplated in the charter, but sanctioned by express legislative grant, and the vote of a majority of the shareholders."[4]

[1] Kernghan v. Williams, L. R., 6 Eq. 228; Green's Brice's Ultra Vires, 215; Attorney-General v. Eastlake, 11 Hare, 205; Same v. Norwich, etc., 16 Sim. 225; 21 L. J. Ch. 141; Zabriskie v. Cleveland, etc., R. Co., 23 How. 381; Memphis v. Dean, 8 Wall. 64; Belmont v. Erie R. Co., 52 Barb. 637; Bliss v. Anderson, 31 Ala. (N. S.) 613; Kean v. Johnson, 1 Stockt. Ch. 401; Black v. Delaware, etc., R. Co., 7 C. E. Green, 130; S. C., 9 id. 455; Zabriskie v. Hackensack, etc., R. Co., 3 id. 178; Green's Brice's Ultra Vires, 79–83, and notes; Balfour v. Ernest, 5 C. B. (N. S.) 601; 28 L. J. C. P. 170.

[2] Ang. & Am. on Corp., §§ 768, 769. See, also, Mayor, etc. v. Groshon, 30 Md. 436; Colman v. Eastern, etc., R. Co., 10 Beav. 1; Salomons v. Laing, 12 id. 339; Fisk v. Chicago, etc., R. Co., 53 Barb. 513; Simpson v. Denison, 10 Hare, 62; Munt v. Shrewsbury, etc., 13 Beav. 1; Stevens v. South., etc., R. Co., id. 49.

[3] Green's Brice's Ultra Vires, 593; Hoole v. Great W. R. Co., L. R., 3 Ch. 262; Menier v. Hooper's Tel. Works, L. R., 9 Ch. 350; Bird v. Bird's Patent, etc., S. Co., id. 358. See, also, Allen v. Curtis, 26 Conn. 456; McAleer v. McMurray, 58 Pa. St. 126.

[4] 2 Redf. on Rail., § 211, p. 9. See, also, Kean v. Johnson, 1 Stockt. (N.

SEC. 403. **Creditor's rights in equity for misappropriation of corporate funds.** — It is a familiar principle in equity, to which we have already referred, that the property of a corporation is held in trust

J.) Ch. 401; March *v.* Eastern R. Co., 40 N. H. 548; Pratt *v.* Pratt, 33 Conn. 446; Durfee *v.* Old Colony & F. R. Co., 5 Allen, 230.

In Bissell *v.* The Michigan, etc., R. Co., 22 N. Y. 258, SELDEN, J., after referring to the two classes of cases of ultra vires, viz.: where the act is in excess of the corporate powers, and where it is in excess of the power of the agent, observes as follows:

"In all the cases belonging to the first class, the object of the action has been to protect the private rights of the shareholders; upon the ground that the action of the directors sought to be restrained would, if permitted, be a breach of trust. It would no doubt be a bar to any relief upon this ground, if it appeared that the parties seeking such relief had themselves assented to what the directors were about to do. They clearly could not be entitled, for their own sake, to protection against acts which they had themselves authorized. But the courts, in cases of this kind, have uniformly, and no doubt properly, acted upon the presumption that the shareholders had not assented to a violation of the charter, and have interfered, if at all, for the purpose of protecting them from a breach of trust on the part of the directors.

"Still it has been repeatedly said, even in cases of this class, that there was a question of public policy involved, which would be sufficient of itself to induce the courts to interfere. The case of Coleman *v.* The Eastern Counties Railway Company, 10 Beav. 1, decided in 1846, was one of this class. It was an equity suit brought by a shareholder in behalf of himself and the other shareholders, against the corporation and its directors, to prevent the latter from entering into a certain agreement with the Harwich Steam Packet Company. The bill prayed for a declaration that it would be a breach of trust on the part of the directors to make the proposed contract, and for an injunction. Relief was granted. Lord LANGDALE, before whom the case was heard, speaking of the extensive powers of railway companies, said: 'We are to look upon their powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be attained *by the public.*' Again, he says: 'In the absence of legal decisions, I look upon the acquiescence of shareholders, in these circumstances, in these transactions, as affording no ground whatever for the presumption that they may be, in themselves, legal.' Here, then, in one of the earliest cases on the subject, in the English courts, we have the very doctrine for which I contend, distinctly recognized and asserted, viz., that the object of every grant of corporate powers is to obtain a *public* benefit; and that the powers granted are the consideration which the *public* pays for the benefit received or expected; and we also have the inevitable consequence stated, that every excess of power by the corporation is *illegal* although acquiesced in by every shareholder.

"Three years afterward the case of Cohen *v.* Wilkinson, 12 Beav. 125; 13 Jurist, 641, came before the same judge. The complainant was a shareholder in the Direct Portsmouth Railway Company, and the object of the suit was to restrain the directors from proceeding to construct a portion only of the road authorized by the charter, without any preparation or intention to construct the whole. The judge said: 'If it were established that the companies of this sort had authority, without a view to the whole, or for the purpose of performing the whole, to complete such part only as they please, or are able, of that which has been called their *contract or bargain with the public,* I think the consequences would be very dangerous *to the public* and to the shareholders, and probably productive of very extensive deception and fraud.' In a similar case which arose shortly afterward, viz., Solomons *v.* Laing, 12 Beav. 339, Lord LANGDALE said: 'Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control or management of the directors, or governing body of

for the payment of its debts, and that creditors may pursue it in case of a fraudulent transfer, into the hands of all persons, except those of *bona fide* purchasers; that directors have no right to

the company, in any manner *not distinctly authorized* by the act of Parliament, is, in my opinion, an *illegal* application or dealing.'

"Thus we find Lord LANGDALE, on three different occasions, asserting, in controversies between the shareholders and the corporation, that all acts and dealings of the officers of such corporation which were unauthorized by their charters, were to be regarded, not simply as breaches of trust, but as illegal and therefore void. But Lord LANGDALE is not the only English judge who has held, in cases of this class, that the unauthorized contracts of corporations are illegal and void, as against public policy. In the case of Beman *v.* Rufford, 6 Eng. Law & Eq. 106, which was an action brought by a shareholder in a railway company, to restrain the directors from carrying into effect a certain agreement made by them, Lord CRANWORTH, Vice-Chancellor, after stating his reasons for thinking the contract unauthorized, said: 'And if that be the correct view of the law, I am clearly of opinion, on all the authorities and all principle, that it is the province of this court to prevent such an *illegal* contract from being carried into effect; because, on the principle that has been so often laid down, this court will not tolerate that parties having the enormous powers which those railway companies have obtained, shall lay out one farthing of the funds, out of the way in which it was *provided by the legislature* that they should be applied.'

"Now I understand those who differ with me on this subject to concede the principle of this case; that is, they admit, that for the directors to enter into a contract which their charter does not authorize would be a violation of their duty to the shareholders, and that the latter may apply to a court of equity and obtain an injunction restraining the directors from carrying the contract into effect. It would be difficult to deny this. For if we take the same view of the nature of a corporation which they take, and consider the directors merely as the agents of the shareholders, and the charter as nothing more than their power of attorney from the corporators, the latter, as the principals, would have a right to repudiate and prevent the execution of a contract, made in their behalf by their agents, without authority; inasmuch as every person dealing with such agents must, as is well settled, be presumed to know the extent of the powers which the charter confers.

"The positton then occupied by some of my associates is this: They admit that the shareholders in a corporation have a right to restrain its directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect if made; and yet they hold that the directors are liable, not in their individual, but their corporate character, to the party with whom the contract is made, for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators. The latter constitute the corporation. Hence, by the two propositions just stated, it is maintained that the corporators have a legal right to enjoin their representatives against the performance of a contract which they themselves are legally bound to perform; in other words, they are liable for damages because their representatives have not performed a contract which they had a right to restrain those representatives from performing. This can hardly be. It would seem to be a legal impossibility. One or the other of these propositions must, I think, be false. Either it must be denied that the shareholders can invoke the aid of a court of equity to prevent the performance of a contract entered into by the directors, which the charter does not authorize,— a principle established by numerous authorities,—or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are

make any dividend of the profits of a corporation among the stockholders until all its debts are paid; and that in case of such dividends, or a sale of the capital stock, and a division of the proceeds among the stockholders, it will not defeat the rights of creditors; but that they may pursue the proceeds, if necessary to secure their rights, into the hands of such stockholders, and compel them to contribute *pro rata* to the payment of the corporate debts out of the proceeds so received. In a recent case involving this question, Mr. Justice MILLER observes: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits, until all the debts of the corporation are paid. Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the

not presumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers. But the contrary is the rule in respect to both.

"It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust, and nothing more, the corporation is not bound by them. This, however, is not the ground upon which I have been endeavoring to maintain that corporations are exempt from liability upon their contracts which are ultra vires; nor is it the ground upon which such defenses have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall, therefore, proceed further to show from the authorities that such contracts are illegal and void for public reasons, entirely irrespective of the fact that they constitute breaches of trust toward the shareholders.

"I shall cite but one additional case belonging to the first of the above classes, viz., Winch *v.* The Birkenhead, Lancashire and Cheshire Junction Railroad Company, 13 Eng. Law & Eq. 506. That was a suit in equity brought by a shareholder to restrain the corporation from entering into an agreement, which amounted to a lease of the defendants' road to the London and Northwestern Company. The Vice-Chancellor, Sir J. PARKER, in disposing of the case, used the following language: 'It seems to me that it is not a question of simple incapacity on the part of the London and Northwestern Railway Company to undertake the working of this line, but that it is *against the policy* of these acts of Parliament, and I think, therefore, that the agreement for making over this property to them is an agreement *savoring of illegality*, which any shareholder in the Birkenhead Company has a right to come to the court to restrain.'"

sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* toward the payment of debts out of the moneys so received, and in their hands." [1]

The general doctrine in such cases is, that the property of the corporation is a trust fund: first, for the payment of its debts; secondly, for division among its shareholders.

And, "if the capital stock," observes Mr. Story, "should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital stock would, in equity, be held liable *pro rata* to contribute to the discharge of such debts out of the fund in his own hands."

[1] Story's Eq. Jur., § 1252. See, also, Vose *v.* Grant, 15 Mass. 505; Wood *v.* Dummer, 3 Mason, 308; Spear *v.* Grant, 16 Mass. 9; Carson *v.* African Co., 1 Vt. 121; S. C., Skinner, 84. In the case of Spear *v.* Grant, *supra*, the defendant was a stockholder in a bank, and withdrew from the bank his stock, when the bank was indebted on bills previously issued, some of which came into the hands of the plaintiff, and the bank failed, and the corporation was dissolved. The action was on the case, and the court held that they were unable to discover any mode by which, at common law, one creditor could compel any stockholder to pay him the amount of his stock, unless there was a fraud on the part of the person sued. But Justice JACKSON observed: "In the case of this bank, a court of chancery would probably sustain a bill by one or more creditors of the bank in behalf of all who should choose to come in against all the stockholders. In such a case new plaintiffs and new defendants might be added after the commencement of the suit, as might be found necessary; and the rights of all concerned, on both sides, might be considered at once. It could then be ascertained how much was due in the whole, to all who should choose to adopt this remedy, and what had been received by each stockholder. The latter might then be compelled to pay each one his proportion of the whole debt, provided it did not exceed the amount of his dividend; and the money thus paid might be divided among the plaintiffs in proportion to their respective claims. If any of the stockholders had become insolvent, it would be determined upon the same principles as in a like case in a court of common law, whether loss arising from that circumstance should be borne by the stockholders or creditors, and this point being settled, the court of chancery would proceed to apportion the loss accordingly among the respective parties. It might also be ascertained, whether any of the present holders of the bills had purchased them at a greater discount, and at a later period; and if this circumstance ought to have any influence in estimating the amount of the debt, or in distributing the money to be paid by the defendants, that court would be competent to make the distribution accordingly." See, also, Cooper *v.* Frederick, 9 Ala. 742; Dudley *v.* Price, 10 B. Monr. 84; Bank, etc., *v.* Chambers, 8 Sm. & M. 49; State *v.* La Grange R. Co., 4 Humph. 488; Banks etc., *v.* St. John, 25 Ala. 566; Johnson *v.* State Marine Hosp., 2 Cal. 319; Scott *v.* Eagle Fire Co., 7 Paige, 198.

SEC. 404. If a stockholder has not fully paid the amount stipulated for the shares he has subscribed for, the sum remaining due may be reached by a creditor of the corporation, if necessary to secure the amount due him from the corporation. All such creditors may, when their interests require it, ask that the fund on which they rely shall really exist in money and not merely on paper, and be held sacred to the discharge of such corporate liabilities.[1]

SEC. 405. **Doctrine as to parties plaintiff generally, in equitable proceedings, relating to corporations.** — We have sufficiently shown that a stockholder or creditor may, under certain circumstances, maintain a suit not only for an injunction but for an account; but such stockholder must, in fact, be one and not simply a person having an inchoate right of membership.[2] "And, therefore, a person who has sold his shares, even though he may still remain under disabilities, cannot institute proceedings."[3] But it has been held that an equitable owner of shares, or a scrip or policyholder of an insurance company, may sue.[4] And it has been claimed that a trustee cannot sue, as "he is not actually concerned in the company."[5]

SEC. 406. The general doctrine, however, is, that policyholders cannot interfere with the management of the internal affairs of the insurance company issuing the same, or with the business policy of the company, whether wise or unwise, as to allow such interference would be extremely mischievous; but they could undoubtedly interfere to restrain waste or a breach of trust.[6] So, a shareholder, although allowed to enjoin the doing of acts entirely or materially different from the objects and purposes of the incorporation, and therefore ultra vires; yet he will not be permitted to enjoin the doing of acts to carry out the objects of its creation, although they may be injurious to the party complaining in another

[1] Wood v. Pearce, 2 Dis. (O.) 411.

[2] Green's Brice's Ultra Vires, 589, and notes.

[3] Id. Doyle v. Muntz, 5 Hare, 509; Scaith v. Chadwick, 14 Jur. 300.

[4] Great W. R. Co. v. Rushout, 5 DeG. & Sm. 290; Bagshaw v. Eastern U. R. Co., 7 Hare. 114; 2 Mc. & G. 389.

[5] Doyle v. Muntz, 5 Hare, 509.

[6] Aldebert v. Leaf, 12 W. R. 462; 2 N. R. 455; *In re* State Fire Ins. Co., 2 id. 565; 34 L. J. Ch. 436; 1 H. & M. 457; 1 DeG., J. & S. 634; *In re* International L. A. Soc., L. R., 5 Ch. 424.

capacity than that of stockholder, and although the public generally may be injuriously affected thereby.[1]

Where there are several owners of bonds secured by a conveyance by mortgage or trust deed to trustees, the question whether the bondholder may maintain an action in his own name has been the subject of judicial controversy and investigation. The general rule deducible from the authorities is, that such individual bondholder cannot, independently of the trustees, maintain the action, unless in case such trustee refuses to bring suit after a request from such bondholder who is entitled to such remedy; or in case of fraud or violation of duty, or conduct, on the part of such trustees, prejudicial or inimical to the rights of the *cestui que trust.*[2]

SEC. 407. On this subject of parties it has been appropriately observed: "Where there has been a waste or misapplication of the corporate funds by the officers or agents of the company, a suit in equity may be brought by and in the name of the corporation, to compel them to account for such waste or misapplication, the directors being regarded as trustees of the stockholders, and subject to the obligations and disabilities incidental to that relation. But as a court of equity never permits a wrong to go unredressed merely for the sake of form, if it appears that the directors of a corporation refuse, in such case, to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to

[1] Baltimore, etc., *v.* Wheeling, 13 Gratt. 40. See, also, High on Inj., § 774.

[2] Coal Co. *v.* Blatchford, 11 Wall. 172; Galveston *v.* Cowdrey, id. 459; Knapp *v.* Railroad Co., 20 id. 117; Alexander *v.* Central R. R. Co. (U. S. C. C. Ia.) 1 Cent. L. J. 545; Van Doren *v.* Robinson, 1 C. E. Green, 256; Williamson *v.* N. J., etc., R. Co., 10 id. 1; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 410; Western R. Co. *v.* Nolan, 48 N. Y. 513; Sturges *v.* Knapp, 31 Vt. 1; Shaw *v.* Norfolk County R. Co., 5 Gratt. 162; Ashton *v.* Atlantic Bank, 3 Allen, 217.

"The appointment of new trustees is an ordinary remedy, enforced by courts of equity in all cases where there is a failure of suitable trustees to perform the trust, either from accident or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause." Story's Eq. Jur., § 1287. See, also, Ellison *v.* Ellison, 6 Ves. 663; 2 Fonbl. Eq., B. 2, ch. 7, § 1, and note; Lake *v.* De Lambert, 4 id. 592; 2 Madd. Ch. Pr. 183; Millard *v.* Eyre, 2 Ves. 94 Buchanan *v.* Hamilton, 5 id. 722; Hibbard *v.* Lambe, Amb. 309.

file a bill in their own names, making the corporation a party defendant. And if the stockholders are so numerous as to render it impossible or very inconvenient to bring them all before the court, a party may file a bill in behalf of themselves and all others standing in the same situation."[1]

The general doctrine in equity is that where the parties having common interests are very numerous, and it is impracticable to bring all of them before the court, one or more may maintain a suit. "The like doctrine," observes Mr. Story, "has been applied to a case where a bill was brought by some shareholders in a joint-stock company (the stock of which was divided into six thousand shares), on behalf of all the shareholders, to compel the directors of the company to refund moneys improperly withdrawn by them from the stock of the company, and applied to their own use. Upon the objection being taken to the want of proper parties, the court overruled it, upon the ground that justice would be unattainable if all the shareholders were required to be made parties to the suit; and that a separate bill by each shareholder, to recover his portion of the money, would produce enormous inconvenience and multiplied litigation, and that the shareholders had one common right and one common interest to be subserved by the suit."[2]

SEC. 408. **Where an injunction will be granted.**— An injunction will always be granted, as we have seen, at the instance of a stockholder or creditor where the corporation or its directors attempt acts ultra vires,[3] as where it proposes to exceed the legitimate scope of its authority, or is going beyond any power conferred upon it.[4] So, corporations may be restrained from any use of their powers which must result in the injury of individuals, especially where the authority claimed by the corporation is doubtful, and where the authority if exercised must place others

[1] Ang. & Am. on Corp., § 312. See, also, Robinson v. Smith, 3 Paige, 233; Bayless v. Orne, 1 Freem. (Miss.) Ch. 173; Hodges v. New Eng. Screw Co., 1 R. I. 312; Hersey v. Veazie, 24 Me. 12; Neall v. Hill, 16 Cal. 145; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Butts v. Wood, 38 id. 181; 37 N. Y. 317.

[2] Story's Eq. Pl., § 109; Hichens v. Congreve, 4 Russ. 562; Crease v. Babcock, 10 Metc. 532.

As to when the corporation is a necessary party. Lyman v. Bonney 101 Mass. 562.

[3] High on Inj., § 770.

[4] Colman v. Eastern, etc., R. Co., 10 Beav. 1; Salomons v. Laing, 12 id. 339.

in great peril.[1] And even, where a remedy at law may exist for the fraudulent mismanagement of the business on the part of the directors, or a majority of them, this may not always constitute a bar to a claim for an injunction.[2] And where, by the fraudulent or improper conduct of stockholders or directors, certain shares have been transferred to them for the purpose of enabling themselves to retain office, an injunction will be granted to prevent them from voting on such stock.[3] So, a contemplated diversion of the corporate funds to other purposes than those provided for or contemplated by the constating instruments, or for which the corporation was organized,[4] or attempts to misapply the funds to carry out any radical change of the purposes of the organization, will entitle a stockholder or creditor to an injunction to prevent it.[5] So, an injunction will be issued to restrain an unjust or unlawful election, or the casting of improper votes at such election.[6]

[1] Mayor, etc., *v.* Groshon, 30 Md. 436.

[2] Sears *v.* Hotchkiss, 25 Conn. 171.

[3] Hilles *v.* Parrish, 1 McCart. (N. J.) 380.

And the bill is not demurrable, if the party to whom a fraudulent sale is to be made is not a party. Abbot *v.* American, etc., 4 Blatchf. 489. See, also, 4 Nev. 138.

[4] Kean *v.* Johnson, 1 Stockt. 401; Smith *v.* Bangs, 15 Ill. 399; Sears *v.* Hotchkiss, 25 Conn. 171.

[5] Illinois, etc., *v.* Cook, 29 Ill. 237.

[6] In a recent article in the Southern Law Review, Mr. High, in discussing the subject of corporate elections and the jurisdiction of courts of equity to grant relief in such cases by injunction, observes: "Brown *v.* Pacific Mail Steamship Company, 5 Blatchf. (C. C.) 525, decided in 1867, is an exceedingly instructive case, not only for its clear and emphatic assertion of the power of courts of equity to control elections of corporate officers, but for the exhibition which it presents of the mysterious devices to which the manipulators of corporate enterprises in the metropolis are prone to resort in furtherance of their schemes. The courts of New York, both state and federal, have given the profession some startling novelties in the law of injunctions, but it may well be doubted whether such peculiar equities were ever brought to the notice of a court of justice as in the case under consideration. Complainants occupied the relation of trustees, holding a large number of shares of Pacific Mail stock, under a written agreement defining the nature and duration of their trust and its conditions, the agreement also containing an irrevocable power of attorney, or proxy, authorizing complainants to vote upon the shares so held by them in trust. The bill alleged that certain of the defendants had been engaged in soliciting proxies for the purpose of voting upon shares of stock at an election for directors about to be held, and that, for this purpose, they had issued a circular charging complainants with unfaithful administration and breach of their trust, all of which charges were alleged by the bill to be false. It further alleged that defendants had purchased a large number of shares of stock for the purpose of getting control of the company, and had bought, or arranged to control, a large number of proxies, so that, without corresponding beneficial interest in the shares which they represented, and without any choice by the persons really owning such shares, defendants were endeavoring to control the election.

"The bill alleged further, that defend-

And this exercise of the equitable jurisdiction of the courts has been disgracefully prostituted in some cases to the enjoining by

ants, being still in a minority of votes, proposed to do certain things, viz.: 1. To obtain an *ex parte* injunction, restraining complainants from voting upon shares held by them. 2. To obtain such injunction upon the pretense that complainants had improperly acquired, or were about to make improper use of the shares held by them; or upon other inaccurate, ill-founded, or partial statements. 3. That such pretenses would be erroneous, unjust, and wholly unfounded. 4. That the injunction would not be obtained, or, if obtained, would not be served, until immediately upon such election. 5. That the result would be to exclude complainants from voting upon the shares held by them, thus permitting a minority of shareholders to succeed in choosing a board of directors, against the wishes of a majority of the complainants. Such remarkable precision displayed by complainants in thus predicting, under oath, the proposed action of the defendants, would seem little short of prescience, were it not for the further allegation in the bill, that complainants' ground of apprehension of defendants' doing these things were, that they had done them before with reference to an election of directors of another company. Other allegations were made, pointing out the injury which, it was believed, would result from the defendants' carrying out their proposed schemes.

"The only denial of the allegations of the bill offered, upon the hearing of the motion for an injunction, was a denial by affidavit of some of the defendants that they had bought proxies as alleged. A distinguished array of counsel argued the motion upon either side. For complainants there appeared O'Conor, Tilden, Evarts and Potter. For defendants there were Woodruff, Emott, Rapallo and Vanderpool. The court found little difficulty in reaching the conclusion that the remarkable allegations of the bill presented a case of such 'imperious necessity' as to warrant the interposition of the extraordinary aid of equity. 'If there ever was a case for relief of some kind by injunction,' says Mr. Justice BLATCHFORD, p. 531 *et seq.*, 'this case is one of that kind, to prevent the commission of so great and admitted a wrong wholly undefended. * * * The election, taking place under these circumstances — which it is thus admitted will be the circumstances of the case — would be perfectly legal, although accomplished in this way by a minority of the votes. There would be no ground, so far as I am able to perceive, for setting aside the election because an injunction, obtained from a proper court having jurisdiction, had excluded certain persons from voting. * * * And this case presents a case eminently of equity jurisdiction, a case of irreparable injury to the plaintiffs, and a case where no such injury can be produced to the defendants. Indeed, under an averment of the bill that these transactions of the defendants will produce great injury to the interests of the stockholders, and the admission or absence of denial of such averment, it is clear that there can be no injury to the proper interests of such of the defendants as are existing stockholders in the Pacific Mail Company by granting an injunction; whereas it is manifest, from the statements of the bill, that there is a clear case of probable irreparable injury to the plaintiffs.' The court also held as to that portion of the bill seeking to enjoin the defendants from voting as proxies for shareholders who were not defendants, and who were not enjoined, that, having its hand upon the defendants associated in carrying out the projected fraud, it might properly enjoin them both from acting personally and as proxies, since otherwise the injunction might be utterly ineffective. The injunction accordingly restrained defendants from voting, either as proxies or otherwise.

"A word of comment as to the form of the injunction as finally granted. * * * It enjoined, first, the inspectors of election from holding any election, 'wherein or whereat Brown Brothers & Co. are enjoined and forbidden, or prevented by any judgment or process of any competent court from casting, or said or any of said inspectors are prevented from receiving the votes of Brown Brothers & Co.,

one court of the exercise of this power by another court of co-ordinate jurisdiction.[1]

SEC. 409. **Where an injunction will not be granted.** — It has been held that an injunction should not be granted to restrain the directors of a foreign corporation from the payment of a dividend at the suit of one to whom the corporation is not indebted, and where the only ground for the injunction is that the directors have committed a mistake in making the dividend, as in such a case the remedy should be in the state of its creation.[2]

And where some of the stock issued by the directors is legal, and some not, they can only be restrained from using the proceeds of such of the stock as is illegally issued.[3] Nor will equity relieve by injunction where the appropriate remedy is by action in the nature of *quo warranto*,[4] nor where the ground of relief is for fraud in the election of officers,[5] nor where the object of the suit is the appointment of a receiver for the management of the affairs

upon the 26,666 shares of the capital stock of that company, standing in their names *in trust*,' etc.

"Thirdly, 'that until the further order of the said court, you, the said defendants, and each and every of you, your directors, agents, officers, servants and proxies do absolutely desist and refrain from any proceedings to restrain or prevent the firm of Brown Brothers & Co., or any member of that firm, from voting at the election of directors of the Pacific Mail Steamship Co., to be held in the city of New York on the 20th day of November, 1867,' etc.

"This extraordinary form of an extraordinary remedy was granted, as appears by the opinion of the court, upon the very forenoon of the day at noon of which the election for directors was to be held. Whether the amply protected firm of Brown Brothers & Co.,' thus panoplied around with a triple wall of injunction, were enabled to cast their votes in peace and safety, without fear of the threatened and impending hand of Barnard or Cardozo, the reporter does not inform us. Certain it is that they had successfully bulled the market on Pacific Mail, and the literature of the profession may be searched in vain, to that time, for a more pronounced instance of one court attempting by its injunction to forestall like action by another tribunal of co-ordinate jurisdiction. It formed no unfitting prelude to the war of injunctions which raged in the courts of New York a few months later, and which has become historical under the name of the 'Erie Railroad Row,' in which the courts of the metropolis, beginning with the tame and uneventful practice of enjoining parties litigant, came at length, by easy and successive stages of judicial evolution, to the novel and entertaining procedure of enjoining each other." South. Law Rev. (N. S.) vol. 111, No. 2, pp. 220-224 (July, 1877).

[1] See article entitled "The Erie Railroad Row," 3 Am. L. Rev. 41 (October, 1868); *ante*, § 245, and authorities cited.

[2] Howell *v.* Chicago, etc., R. Co., 51 Barb. 378.

[3] Fisk *v.* Chicago, etc., 53 Barb. 513. See, also, O'Brien *v.* Same, 53 id. 568; Blatchford *v.* Ross, 54 id. 42.

[4] Hartt *v.* Harvey, 32 Barb. 55; Mickles *v.* Rochester, etc., R. Co., 11 Paige, 118.

[5] Id.

of the corporation, will the directors or other officers be enjoined from acting in their official capacity where this is not necessary to accomplish the purposes of the suit,[1] nor where it appears that the proceedings of a stockholder are not for the protection of his own interests but to aid others,[2] nor to restrain a stockholder from voting upon an alleged excess of stock in his possession, where no steps have been taken by the company to cancel the excess,[3] nor where a shareholder who claims to be defrauded by the issue of stock seeks to restrain the corporation from disposing of its property leaving insufficient to indemnify him for his loss, as he stands in no better position than a general creditor.[4]

A party may also waive his rights to an injunction and be estopped from such proceedings by his conduct. "Thus, where a depositor in a savings bank has consented that his deposit may be converted into stock, as a security for the debts of the corporation, and his conduct has been such as to amount to a voluntary dedication of his stock for the purpose of securing the debts, he is regarded as estopped from claiming relief in equity, and an injunction will be refused."[5] Nor will a corporation be enjoined from acting in its corporate capacity for the purpose of securing legislative authority to change its objects and powers.[6] But an injunction may be properly allowed in such a case where there is an attempted use of corporate funds for defraying the expense of procuring an extension of corporate powers beyond the legitimate objects for which the corporation was instituted.[7]

SEC. 410. **Specific performance — right of way.** — Where a party agreed under seal to permit a railroad corporation to construct a road over his land, and to convey a right of way therefor for a certain sum, after the railroad should be definitely located, with a condition in the deed of conveyance, that the deed should be void when the road should be discontinued, it was held, that specific

[1] Stevens v. Davison, 18 Gratt. 819.

[2] Sparhawk v. Union, etc., R. Co., 54 Pa. St. 401.

[3] Reid v. Jones, 6 Wis. 680; High on Inj., § 779.

[4] Whelpley v. Erie R. Co., 6 Blatchf. 271.

[5] Maryland, etc., v. Schroeder, 8 G. & J. 93. See, also, Gravestine's Appeal, 49 Pa. St. 310.

[6] Ware v. Grand, etc., R. Co., 2 R. & M. 470; Stevens v. South, etc., R. Co., 13 Beav. 49.

[7] Munt v. Shrewsbury, etc., R. Co., 13 Beav. 1; Stevens v. South, etc., R. Co., id. 49; High on Inj., § 772. See, also, Ward v. Society, etc., 1 Coll. 370.

performance of such an agreement should be decreed after the road was constructed over it, although the corporation did not expressly bind itself to take or pay for the land. And it was also held in such a case, that, where the corporation located the road over the land and continued to use the same, and was in actual possession of it for more than three years, a bill filed by it for a specific performance of the agreement, would not be dismissed on the ground of unreasonable delay in filing it.[1]

[1] Western Railway *v.* Babcock, 6 Metc. 346. In this case SHAW, C. J., observes:

"One other consideration, which we think applicable to such a case, is this, that where a man has stipulated, for a certain consideration, to permit a company to construct a road over his land, by any one of two or more routes, at their option, it is not competent for him afterward to resist the performance of his agreement, by showing that he was induced to believe, either by his own notions, or by the representation of others, as to the preference of one over the other, that a particular one was adopted which he did not expect; nor would this result be affected, if the other party, or their agents, had made such representation, as to the probability of their adopting one route in preference to the other, or of the relative advantages of each. Having, by the terms of the contract, stipulated for the right to adopt either, and stipulated to pay a consideration for such right of choice, all representations respecting the probability of their adopting one rather than the other, must be considered as merged in the agreement; and if, in fact, the one route would cause more damage, and the land-owner intends to claim larger compensation in one case than in the other, the alternative must be stipulated for in the agreement itself.

"One objection was taken to this agreement, not, we presume, to its legality, but to the fitness and propriety of enforcing its performance in equity; which is, that it was not mutual, because, although the defendant bound himself to convey his land at certain prices, the company did not bind themselves to pay him those prices.

"In the first place, the contract, being under seal, and made upon a nominal pecuniary consideration, was binding in law, without other consideration. Again, it was conditional; it was the grant of a license to enter upon his land, and lay out their railroad over it, at their option. If they should not take his land, he would be entitled to no further compensation. But further, as this was a grant to them, on condition, of a license, with certain rights, interests, and easements in the land, there would be good ground to hold, that if they accepted and acted upon this grant, they were bound by the conditions, and that an action would lie for the money. As where a grant is made by deed poll, the grantee paying money, or performing any other condition, an acceptance of the grant binds the grantee to a performance of the condition, for which assumpsit will lie. Goodwin *v.* Gilbert, 9 Mass. 510.

"But a more decisive and perhaps more satisfactory answer is, that the direct stipulation of the defendant was to execute a qualified, defeasible conveyance of the land to the company, on certain payments being made. The payment was a condition precedent, and the company could obtain no benefit from the agreement without first paying or tendering the stipulated rates of compensation. This was an ample security for the defendant, binding the company to a compliance with the agreement on their part, and renders the agreement reciprocal; and the condition subsequent, to be inserted in the deed to be made by him, rendering it void if the railroad over his land should be discontinued, was a sufficient guaranty that the grant would not continue when the land should cease to be appropriated to that public use.

"That such an agreement, if fairly made, is a legal contract, and that it affords a proper ground for a decree

for specific performance in equity, we can have no doubt.

"In executing public works, where private property must be taken for public use, the cost of the work, as affected by the compensations thus to be paid, enters largely into the consideration, both of the legislature and of those agents and commissioners who may be intrusted with the consideration of the subject, in determining, first, whether the work shall be undertaken at all, and, if so, then what route shall be selected. Such a decision must be influenced mainly by a comparison of the expense with the utility of several proposed routes. If it is to pass over lands covered with dwelling-houses, or otherwise of great value and cost, it would be a strong inducement to the adoption of a less expensive route, or operate as a decisive objection to the enterprise. But the owners themselves know the value of the property, and the prices at which they are willing to part with it, for the accomplishment of the proposed object, taking into consideration the advantage, if any, which it may confer on their other property. A previous contract, stipulating provisionally for a grant of the land, or of a right of way over it, on certain specified terms, is well calculated to give authentic information, to prevent all mistakes and misunderstanding arising from mere verbal propositions and representations, and to secure the rights of all parties.

"Taking such a contract, when fairly made, on good consideration, without fraud or duress, to be perfectly legal and equitable, a specific performance, by a decree in equity, is plainly the only *adequate remedy* that such a public corporation could have. The use of the land, when the location is fixed, is absolutely essential to their franchise, and a compensation in damages, in an action at law, would afford them no relief. Indeed, the right to the use of the land, for a public purpose, is secured by the constitution and laws of the land, independently of any contract; and by their act of incorporation vested in the company, for the use of the public; and if a specific performance of the agreement, on the part of the land-owner, were not given in equity, and the result were that he should obtain his damages in the mode pointed out by the statute, if they should exceed the amount stipulated for in the agreement, the company, in an action at law, on the contract, would recover back the same amount in damages. If, therefore, the agreement is a valid and equitable one, this remedy, by specific performance, ought to be allowed, to avoid circuity of action.

"With these considerations in view, the court have considered the subject as one of fact upon the evidence. There is considerable conflict of evidence, especially as to what took place at the defendant's house when the agreement was executed. Without stating the evidence at large, which is quite voluminous, the conclusions which we have come to are these: That there was no fraud or false representation on the part of the company's agent; that the route, described in the agreement, was clearly and definitely stated as the west line, or Child's line, and was known to, or might easily have been known to, Babcock, the defendant, and was at least as well known to him as to the agent; that this was the line ultimately adopted by the company as the route of their road; that the agreement was read over to the defendant, before he executed it, with an honest purpose to enable him fully to understand it; that there was no mistake on the part of the defendant as to the route expressed in the agreement; and that, if he was induced, from any cause, to suppose that the company would not pursue the route they did, but adopt another, which he supposed would be more beneficial to them, and better for him, it is not a mistake into which he was led by the company's agent, nor one which affects this agreement.

"And the result of the opinion of the court is, that the agreement is valid in law, that the defendant has shown no sufficient ground to excuse him from a performance in a court of equity, and, therefore, that the complainants are entitled to a decree for such specific performance."

In Sturges *v.* Knapp, etc., 31 Vt. 1, REDFIELD, J., observed: "This bill is brought by the plaintiffs, holding a majority, in amount, of the bonds secured by the mortgage of the Western Vermont Railway, executed to Knapp and Briggs, as trustees for the holders of the bonds, praying a decree, that Knapp and Briggs, after the fore-

closure of the mortgage, held no estate in the premises conveyed, except a mere nominal, naked, or dry trust, for the sole benefit of the *cestuis que trustent*. In other words, that the trust did not impose any functions or duties whatever, except to convey the estate to the *cestuis que trustent;* that it was a naked use of the character, which the statute of Henry VIIIth would have executed, without the formality of a conveyance; and, as a consequence thereof, that the contract of lease, made by Knapp and Briggs, to the Troy and Boston Railway Company, may be declared void, and an account taken of the profits made by the railway company, a receiver appointed, and the sum found due decreed to the plaintiffs and their associates.

"1. The first, and the great inquiry in the case is, in regard to the nature of the estate in the trustees, created by the mortgage, the forfeiture, and the forclosure.

"It is obvious that the estate must depend very much upon the implications growing out of the relations of the parties, and the duties consequent thereon; and that these may change, from time to time, as circumstances change. That which begins as an active, responsible, and fiduciary trust, may, by lapse of time, and intervening relations, become merely a naked, dry trust, and *vice versa*. The nature and character of all trusts depend, almost exclusively, upon the implications growing out of the state of the property, the purposes desired to be accomplished, and the mode provided for that end. And it is one of the most important, and, at the same time, one of the most delicate and difficult offices of a court of equity, to raise these implications, with wisdom and justice, so that the full purpose and object of the trust shall be effected, without violence, or forced construction of the instrument under which the trusts are created.

"All contracts are, more or less, subject to implications, constructive additions, and implied limitations. These are the powers by which courts, in matters of contract, are enabled to make a brief memorandum, which does not express one-tenth part of what is intended, speak truly and fully the mind of the parties. These limitations and implications must indeed be conceived in the spirit of liberal, wise and far-sighted circumspection, or they will be liable to become a terror to all just sense of uprightness and fair dealing. Herein consists the power and the wisdom of courts of justice in the administration of civil jurisprudence, in making shreds and fragments, and even finesse and indirection, sometimes subserve the ends of fair dealing and justice. It is to be expected that some cynical sneers will sometimes be heard, with reference to these implications and constructive additions, both as to contracts and statutes, either in more or less of the spirit of seriousness and complaint, or of badinage and pleasantry, or both, perhaps. But still the process must go on, so long as human imperfection and cultivated society, with its manifold and complicated relations, continue the same they now are. It is not impossible that every case, which occurs in a court of justice, may give occasion for the exercise of something of this function of judicial construction.

"But upon no subject is there so much demand for the exercise of construction, and of judicial implications, as in regard to trusts, and especially trusts of this complicated and public character. And these implications and constructive additions are not the less a part of the contract than its most express provisions.

"There are extensive trusts connected with the whole subject of corporate action, which come under the class of what in the books are denominated constructive or implied trusts. In one sense the corporation itself is a mere trustee, holding all its funds, and all its powers and franchises, in trust for the shareholders, who are the ultimate *cestuis que trustent*. So, too, the directors of a corporation are mere trustees, holding their office and performing their functions strictly as trustees, for the benefit, ultimately, of the shareholders, and directly, and primarily, of all having claims against the company.

"The persons to whom these mortgage bonds are payable have not only the express trusts to perform, which are created by the terms of the deed, under which they are made trustees, but they are also constructively trustees (after the forfeiture, and taking possession of the road, which they

may always do after condition broken), for subsequent incumbrancers, for the corporation, and ultimately for the shareholders themselves.

"But it is not with these classes of constructive or implied trusts that we are chiefly, at present, concerned. It is with the express trusts, created by the terms of the deed, when construed and expounded by the attending circumstances, and the reasonable implications, and necessary limitations, that we have to do at present.

"We cannot, of course, go much into detail here upon so extensive a subject as that of the construction of powers, and executory or active trusts. The books are filled with cases of this class, involving interests of the greatest magnitude, and where the terms of the deeds, or instruments, by which the trusts were attempted to be created, were deficient, in all specific definition, of the purposes expected to be accomplished, and especially in regard to the mode of its accomplishment. In all these cases, the courts of equity have not scrupled to carry out the apparent purpose of the contract, in the mode most consonant with the terms used, as interpreted by the known and obvious rules of construction. We shall not stop to discuss a class of cases so numerous, and all tending to the same result, the accomplishment of the apparent and obvious purposes of the contract. We proceed at once to the consideration of the nature of the trust, created in the case before us.

"And it will scarcely require distinct enunciation here, that, in entering upon a subject so new, so difficult, and where the consequences of mistake are likely to be of such importance to the state and its citizens, we have attempted to proceed with reasonable caution and circumspection; and, at the same time, fairly to meet the emergency, without shrinking from its weight or responsibility, deeming it of the last moment, that, upon such a subject, we start, if possible, in the right direction, and with a just comprehension of the interests at stake.

"We think it could scarcely escape the notice of any one, who had seriously and patiently attempted to master this question, that, until the actual foreclosure of the mortgage, the trusts involved in the contract, and imposed upon the trustees named, are entirely fiduciary and executory. At first, and so long as prompt payment is made, it is understood, in practice, indeed, that the office of such trustees is rather silent, and the duties of the trustees, by means of the negotiability of the bonds, and of the coupons attached, are ordinarily performed, or expected to be performed, by the corporation or its officers. If the interest in the coupons, and the principal, as it falls due, are promptly paid by the corporation, so that no forfeiture occurs, it will never become of sufficient importance to consider the question, what is the precise nature of the trust created by the contract in the first instance.

"But after the forfeiture occurs, either by non-payment of interest or principal, or both, as in the present case, the duties of the trustees become, not only active and responsible, but critical and delicate. It not only is not a dead, dry trust, but is one of the most active and momentous responsibility. We presume no man, who had ever been placed in such position, and who had any proper sense of his position, would ever think of regarding or treating it as, in any sense, a trust of a nominal or indifferent character. It is not a dry trust at this point certainly, or, if so, it is not in the sense of the books; if so, in any sense, it is not so in regard to its duties or responsibilities.

"The trustees must then elect between delay and action; between, on the one hand, taking possession of the road and its fixtures, and thereby assuming, at once, the vast public and private burdens and responsibilities of a great public work, forming, perhaps, a necessary link in some great thoroughfare; and, on the other, delay, and consequent further embarrassment, complication, and loss; or they must undertake the ulterior and final remedy of foreclosure. And those persons, if any such there be, who could regard the discharge of such a trust to be exercised in the face of such alternatives, as any formal or nominal affair, have certainly yet much to learn in regard to the nature of this business. For, at this point, it will not be assumed, that the trustees could have surrendered the trust to the *cestuis que trustent*, or that they were in any condition to obtain counsel from them. It was the sole, or

the first purpose of their office, that they should act, and should exercise their wisdom and discretion upon the possible occurrence of this very emergency. They were selected, doubtless, with reference to their capacity and responsibility for this very contingency, both by the corporation and the *cestuis que trustent*, and neither of these parties had stipulated to deal directly with the other, but only with the trustees, as the responsible party. This duty they must meet and perform. This they did do.

"The next inquiry is, whether their functions ceased upon the foreclosure? When we look at the position of affairs at this time, it seems difficult to come to any such conclusion. The powers and duties of the corporation, in regard to the road and its franchises, under such a mortgage and foreclosure, must be regarded as effectually terminated for all practical purposes. The trustees, and the *cestuis que trustent*, one or both, had effectually become the corporation, or had acquired all its essential rights, and assumed all its duties, so far as the public was concerned. And these were important and pressing. Delay, for the shortest interval, might be attended with disastrous consequences to the continuance of the franchise even, and must be so, in every view, to the interests of the *cestuis que trustent*. The road could not, in strict propriety, be allowed to stop for a single day; and it could not be allowed to cease operation for any considerable time, with any safety to the interests of those to be affected by the depreciation of the property and the intervention of counter interests and influences.

"The *cestuis que trustent*, the holders of these bonds, were a changing, unorganized body, having no common bond of union, and no recognized principle of action, unless by unanimity of consent, which is practically impossible. It would not be expected under such circumstances that there should be an immediate surrender of the property to this heterogeneous and chaotic mass of men, women (single or married) and infants, many of whom were under such disabilities that they could not act for themselves, and where consequent delay must ensue in providing the means of obtaining their consent, in a legal form, which must be fatal to the enterprise. All this must be regarded as in the contemplation of the parties at the time of entering into the contract by which the bonds were issued. It must be so regarded in looking for the true construction of the contract, for in that we are attempting to obtain the mind and will of the parties at the time of making the contract in regard to the state of facts which has now intervened; and it will, perhaps, fairly test this to ask ourselves what would have been their probable response had the inquiry then been put to the parties, What shall be done with this property, and how shall it be managed, in case of foreclosure? Shall the trustees continue to manage it for the time being, and until the order of the court of chancery, as in the case of other trusts? It seems to us there can be but one response to this question. The trustees seem to have been selected for this very office, among others, of controlling and managing the property, in case of forfeiture and surrender, *as trustees*, for the benefit of the *cestuis que trustent*, in order to make it available for the payment of the bonds, both interest and principal. This must be so until some organization of the bondholders, and the acquiring of some capacity to act by a majority, or in some such way as to enable them to discharge this new class of duties thrown upon them by the forfeiture of the condition of the mortgage and the surrender of the road with its incidents and fixtures.

"After the surrender, and before foreclosure, as we have before intimated, while the control of the road for the benefit of the bondholders might fairly be presumed to be temporary, it could not, with the least show of propriety, be expected that any change in the principle of their mode of action should be attempted. Any one who accepted the office of trustee under a contract of this character must be supposed to look directly at the reasonable probability of the occurrence of this contingency, the failure to pay promptly, and to have assumed his position with reference to the new duties resulting from the occurrence of such contingency, and would, consequently, be bound to perform the duties arising from it. And all the other parties in interest, the bondholders, the creditors of the cor-

poration, in the order of their priority, the corporation itself, and, ultimately, the shareholders, will have a vested interest in having these duties performed by such trustees, under the security of their responsibility and capacity, both pecuniary and personal. And we do not well perceive how they can be relieved from this responsibility, except by the decree of the court of chancery, who alone have the legitimate control over such matters.

"And it is well settled in the court of chancery that trustees are not to be removed or discharged from part of their trust, leaving them burdened with and responsible for the remainder. Goodson *v.* Elliason, 3 Russ. 594. Nor will such a trust be discharged until fully performed, or the *cestuis que trustent* are in a condition to manage it themselves. Nor will trustees be changed, except for sufficient cause, affecting the faithfulness and capacity of the trustee, or the interest of the *cestuis que trustent*, or, perhaps, on account of the public interest, which is extensively concerned in trusts of this character. These are but elementary principles in the law of trusts, familiar to every one the least conversant with the subject, and will be found distinctly laid down in the elementary treatises upon the subject.

"And a trustee, once having assumed the office, is morally and legally bound to continue in the performance of its duties until discharged by the order of the court of chancery, or the unanimous consent of the *cestuis que trustent*, which, in a case of this kind, where there are of necessity always more or less of infants, married women and others under disabilities incapacitating them to act personally, or in any way effectually, except through the guardianship of the court of chancery, is morally impossible, and practically so, except through the agency of a court of equity.

So, that before the actual foreclosure of the mortgage, there can be no question whatever that the trustees are the only responsible party in regard to the management of the property.

And, after the foreclosure, it seems to us that although the contingent interests are mostly cut off, and the number and character of the ultimate *cestuis que trustent* very much changed, — reduced in number and simplified in regard to their interests, — the duties of the trustees, and the necessity of their continuing to act, remain much the same.

The necessity of immediate and efficient action is precisely the same, and so is the difficulty or impossibility of accomplishing it through the *cestuis que trustent*, and the utter ruin to the interests at stake in consequence of any considerable delay is none the less imminent. There would, therefere, seem to be a duty remaining in the trustees to manage the property for the benefit of the *cestuis que trustent*. And this duty is to be estimated by the surrounding circumstances, and what a prudent owner would esteem reasonable under these circumstances. We do not say they are to perform this duty permanently, but they must do it until they can be legally exonerated.

"II. And this duty must be performed in a manner to meet all the incidents of the case, taking into account the nature of the property, the public demands upon those who operate the road, and the duty of securing the greatest permanent return to *cestuis que trustent*. And not only the nature of the property, but the extent of the equipment, included in the mortgage, and which comes to the trustees, must be considered.

"We have, then, in the present case:

"1. An entire road of more than fifty miles in length, with no adequate equipment whatever. And if the equipment were perfect it is questionable how far the trustees are bound to assume the burden or responsibility of personally operating the road, farther than results necessarily from the fact that the legal title is in them, and that the public have no other party to look to in the first instance. But, as they had no equipment in this case, it would not be expected they should attempt to purchase one. Under such circumstances we might expect prudent managers to look either to a lease to some party owning a road in connection, and having sufficient rolling stock to operate both roads, or to some other party having rolling stock, the use of which could be secured at a reasonable rate. Both of these modes were practicable in the present case. But it would seem that the one which the trustees elected

was preferable, as imposing less risk and promising more return, especially after the short experiment made by the trustees of attempting to operate the road by means of agents, with hired rolling stock, which produced a loss of some thousands of dollars in a few days.

"This road was part of an important thoroughfare in the state, affecting transportation and travel to a large extent, thereby making it the duty of the public authorities to insist upon the strict and faithful performance of its public functions and duties. There were, also, rival lines of transportation and travel, whereby it became important to the interests of the *cestuis que trustent* that the operation of the road should not be suspended for even the shortest period of time, as such suspension would destroy confidence in its permanent efficiency and produce a diversion of traffic, which could not fail to be seriously injurious to the interests of the *cestuis que trustent.*

"3. It was a species of property which could only be made remunerative by placing large interests and long lines of communication, as far as practicable, under unity of control and management.

"4. They could not consult the entire body of *cestuis que trustent*, and their duty being due to the body severally, they were not at liberty to follow the advice or wishes of the majority, as they were still liable to the minority for faithful administration. And, in showing this, the advice of the majority would be no more conclusive in their favor than that of others equally skilled and equally interested in the question. Having assumed the duty of faithful administration of the trust in behalf of the several owners of the bonds, they were not at liberty to shield themselves by any thing short of showing the fact of such administration, or that they were excused by the owners' unanimous consent from the performance of their duty under the trust.

"5. They must act without delay, and under the responsibility of being made liable for a breach of trust, if they failed to act in time, or to act with proper discretion, wisdom and forecaste.

"6. It was a trust of a character so entirely new that very little light could be gained from any analogy to other trusts. Even the right of the trustee of real estate, held for the support and benefit of the *cestuis que trustent*, where the right to lease for twenty-one years, or even for a much longer term, is unquestionable, could afford no satisfactory guide in a case like the present. There is a very essential difference between land and buildings, even where comparatively small repairs are required to maintain them in tenantable condition, and a railway, where heavy expenditures are requisite from day to day. So that the powers and duties of trustees in regard to lands and buildings and other real estate of that kind are not in any just sense a guide for trustees of the character now under consideration.

"Under all these circumstances, the question presents itself, as it occurred to the mind of the trustees at the moment of the foreclosure. They would naturally try, as they did, the temporary expedient of operating the road on their own account, if the thing were practicable, as the test of this mode of administering the trust. This, we think, proved so disastrous that the trustees ought not longer to have continued it if any mode presented itself whereby they could exempt themselves from loss, and especially if gain could be secured. The leasing the property to some connecting road was obviously the most hopeful expedient practicable."

CHAPTER XV.

EXECUTION AND THE APPOINTMENT OF RECEIVERS.

SEC. 411. **The common law doctrine in reference to execution.** — An execution is said to be the end and fruit of the law; *executio est finis et fructus legis.* It makes the judgment effective, and usually all property and pecuniary interests of the defendant, not exempt from execution, is subject to satisfaction of the judgment. But, in reference to corporations, there is, at common law and in the absence of any special statutory provisions on the subject, a further exception, viz.: that the franchises of a corporation as well as the means necessary to the existence and execution of the corporate powers, and to carry out the purposes for which it was instituted, are not the subject of levy and sale on execution.[1] Mr. Herman observes: "Corporations are not formed or created by an execution sale, and until the proper and necessary steps are taken by the state to forfeit its charter and terminate its existence it still possesses the power granted it; the lands, easements or works appurtenant or essential to the practical use and occupation of the franchise cannot be sold separate from the franchise, so as to impair its value or impede its use."[2]

Neither are the tolls or products of the franchise subject to such

[1] Hatcher v. T. W. & W. R. Co., 62 Ill. 477; Brufett v. G. W. R. Co., 25 id. 353; Stewart v. Jones, 40 Mo. 140; Thomas v. Armstrong, 6 Cal. 280; Munroe v. Thomas, 5 id. 470; Wood v. Turnpike Co., 24 id. 474; James v. Plank R. Co., 8 Mich. 91; Coe v. Railroad Co., 10 Ohio St. 372; Seymour v. Turnpike Co., 10 Ohio, 476; Atkinson v. Railroad Co., 15 Ohio St. 21; Youngman v. Railroad Co., 65 Pa. St. 278; Western Railroad Co. v. Johnston, 59 id. 295; Canal Co. v. Bonham, 9 W. & S. 27; Gue v. Canal Co., 24 How. 263.

[2] Herman on Executions, 551; Amant v. Turnpike Co., 13 S. & R. 210; Canal Co. v. Bonham, 9 W. & S. 27; Coe v. Railroad Co., 10 Ohio St. 372; Atkinson v. Railroad Co., 15 id. 21; Commonwealth v. Company, 5 Cush. 509;

levy and sale, so as to prevent the company from demanding and receiving the same, or so as to divest it of its right of ownership and possession.[1]

Youngman *v.* Railroad Co., 65 Pa. St. 278; Plymouth R. Co. *v.* Colwell, 39 id. 337.

"Where a corporation, like a bridge or turnpike company, has no tangible property that can be subject to execution and it has nothing but a mere franchise or easement from which its income and revenue are derived, there is nothing that can be levied on or taken by the officer in satisfaction of the writ; in such cases, where no levy can be made, the equitable powers of the courts in those states where they have abolished the distinctions between law and equity, and in others, where the distinctions still prevail, a court of equity will grant relief to the creditor in the appointment of a receiver, to take possession, charge and control of the franchises and revenues, who as the officer of the court accounts to it, and under its direction satisfies the claim or judgment of the creditor." Herm. on Execu., § 361. See, also, Covington, etc., R. Co. *v.* Shepherd, 21 How. 112; Macon, etc., R. Co. *v.* Parker, 9 Ga. 393.

In the case of Gue *v.* Canal Co., *supra*, the United States marshal for the district of Maryland seized and advertised for sale, under an execution, a house and lot, sundry canal locks, a wharf, and sundry lots, which belonged to the defendant. An injunction was obtained against the sale, which was made perpetual; and on appeal from the United States circuit court for Maryland, was in the supreme court of the United States made perpetual. The court observes: "Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*. If it can be done in any of the states it must be done under a statutory provision of the state of Maryland, changing the common law rule in this respect.

Indeed, the marshal's return and the agreement of the parties show it was not seized and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely any thing from the useless canal locks and lots adjoining them. The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against principles of equity to allow a single creditor to destroy a fund, to which other creditors had a right to look for payment, and equally against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which was essential to its useful existence. In this view of the subject the court do not deem it proper to express any opinion as to the right of this creditor in some other form of judicial proceeding to compel a sale of the whole property of the corporation, including the franchise, for the payment of his debt."

So it has been held that neither the turn-tables nor the freight cars found on the road can be levied upon and sold on execution against a railroad company, as they are part of the realty, and cannot be severed and sold. Titus *v.* Mabee, 25 Ill. 257; Seymour *v.* Milford, etc., T. Co., 10 Ohio, 476; Hunt *v.* Bullock, 23 Ill. 320; Palmer *v.* Forbes, 23 id. 302; Western Pa. R. Co. *v.* Johnston, 59 Pa. St. 290; Leedom *v.* Plymouth, etc., R. Co., 5 W. & S. 265; Susquehanna Canal Co. *v.* Bonham, 9 id. 27; Wood *v.* Turnpike Co., 24 Cal. 478.

[1] Rorer on Jud. Sales, § 1069. See, also, Herm. on Executions, § 361; Gue *v.* Canal Co., *supra;* Plymouth R. Co. *v.* Colwell, *supra;* Youngman *v.* Alexandria R. Co., 65 Pa. St. 278.

But it is also held that the wood and iron of a railroad company may be taken on execution and sold, although such personal property may be necessary to enable the corporation to carry out the purposes of its creation, and without which it may be unable so to do.[1] And in New Hampshire the locomotive engines, passenger cars and freight cars of a railroad corporation are liable to attachment or execution when not in actual use.[2] The general doctrine is, that the property of a corporation, real and personal, may be taken on execution and sold, the same as in case of individual defendants and that the tangible property and estate is no more exempt from execution than that of an individual.[3]

Much controversy has existed in reference to the character of rolling stock, and its liability to execution, depending upon the question whether it belongs to the real estate, and is, therefore, subject to mortgage and other lien on its real estate, or whether it is personal property, and, therefore, not covered by such liens. The courts seem to be divided on this question. But, from the preponderance of authority, for most purposes, it is considered as personal property, and that as such, and as against liens upon the right of way, and other real estate of the corporation, it is subject to execution, and may be taken and sold in the same way that other personal property may be sold on execution.[4]

[1] Herm. on Ex., § 361. See, also, State v. Rives, 15 Ired. 297; James v. Railroad Co., 6 Wall. 750.

[2] Boston, etc., R. Co. v. Gilmore, 37 N. H. 410; Rover on Jud. Sales, 346. Its property, real and personal, may be sold as in case of individuals. Herm. on Execu. 550.

[3] See Herm. on Execu., § 360; State of Maryland v. Bank of Md., 6 G. & J. 219; Slee v. Bloom, 5 Johns. Ch. 366; S.C., 19 Johns. 456; Peirce v. Partridge, 3 Metc. 44; Perry v. Adams, id. 51; Queen v. Victoria, etc, Co., 1 A. & E. (N.S.) 288: State v. Rives, 5 Ired. 297. See, also, Regina v. Victoria, etc., Co., 1 Q. B. 289; Boyd v. Chesapeake, 17 Md. 195.

[4] Coe v. Railroad Co., 10 Ohio St. 372; B. C. & M. R. Co. v. Gilmore, 37 N. H. 410; Randall v. Elwell, 52 N. Y. 522; Hill v. La Crosse, 11 Wis. 214; Pierce v. Emery, 32 N. H. 484; Minnesota v. St. P. R. Co., 2 Wall. 609; Stevens v. Buffalo, etc., R. Co., 31 Barb. 591; Beardsley v. Ontario Bank, id. 619; Hoyle v. Plattsburgh, etc., R. Co., 54 N. Y. 314; Herm. on Ex. 561. See, also, 6 Am. Law. Reg. 502; 1 Dis. (O.) 552.

The character of rolling stock as real or personal property, as well as its liability to execution, is sometimes fixed by statute. Thus, in Wisconsin it is provided by statute that all rolling stock of any railroad company, used and employed in connection with its railroad, shall be a fixture. Taylor's Stat., p. 1048, § 53. See construction of this statute, Chicago & N. W. R. Co. v. Borough of Fort Edward, 21 Wis. 44.

It is also provided by the constitution of Illinois, as follows: "The rolling stock and all other valuable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal prop-

SEC. 412. **Where the statute provides for sale on execution.** — We have noticed that statutes sometimes provide for the sale of the corporate franchise on execution. In such cases the statute must be strictly followed; and no title will pass by the sale unless made in such a manner as the statute prescribes.[1] On the sales of shares or of the franchise, under the provisions of a statute a distinction is made between it, and an ordinary sale of personal property. In the former case there can be no tangible possession taken by the officer or delivered to the purchaser, as in the case of the latter, where it is held that the actual delivery of the property sold gives the purchaser the title although it may be irregularly conducted by the officer, whereas in the other case, there being no tangible property, the validity of the transfer must rest upon a substantial compliance with the provisions of the statute.[2] Thus, if the officer has failed to give the notice required by the statute, this will render the sale void.[3] And where the statute gave authority to sell the franchises of a plank-road on execution, it was held that a sale could only be made in the manner pointed out by statute; and that an illegal sale under such circumstances will not be rendered valid by the acquiescence of the stockholders in the purchaser's possession, the payment of tolls to him, or by the expenditure of money by him to repair the road, with the knowledge of the stockholders.[4]

SEC. 413. **Doctrine as to the subjection of stock to execution.** — It seems to be a common-law doctrine that the stocks or shares held

erty of individuals, and the general assembly shall pass no law exempting any such property from execution and sale." Const. Ill., art. xi, § 10, which took effect August 8, 1870.

Rolling stock of a railroad is, in the absence of statutory provisions, and circumstances showing a purpose to treat it otherwise; and according to a preponderance of authority as well as the soundest reason, based upon the circumstances under which, in the progress of railroad enterprises, we find such stock used, personal property. See *post*, § 467; Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314.

[1] James *v.* Plank-road Co., 8 Mich. 91; Gue *v.* Canal Co., 24 How. (U. S.) 257; Stamford Bank *v.* Ferris, 17 Conn. 259.

[2] Titcomb *v.* Union Ins. Co., 8 Mass. 326; Howe *v.* Starkweather, 17 id. 240; Taylor *v.* Jenkins, 6 Jones' L. (N. C.) 316.

[3] Howe *v.* Starkweather, 17 Mass. 240. See, also, Titcomb *v.* Union Ins. Co., 8 Mass. 326.

The return of the officer should show a compliance with the requirements of the statute. Davis *v.* Maynard, 9 Mass. 242; Hammatt *v.* Wyman, id. 138. See, also, State Bank *v.* Tutt, 44 Mo. 367.

[4] James *v.* Pontiac P. R. Co., 8 Mich. 91. See, also, Oakland R. Co. *v.* Keenan, 56 Pa. St. 198.

by a party in an incorporated company is a mere personal interest; that the certificates thereof are a mere evidence of ownership, and have no value in themselves;[1] and that such shares and interests are not liable to levy and sale on execution, unless provision therefor is made by statute.[2] "Where property is of so intangible a nature," observes Mr. Brice, "that there can be no change of possession, as shares in a corporation, and it cannot be known whether they are attached or not, the sale of them on execution is a mode of transfer not authorized at common law."[3]

SEC. 414. **Statutes generally provide for garnishment of the interests of stockholders.** — The shares held by debtors not being liable to levy and sale on execution at common law, it has in many, if not most of the states, been provided by statute that the interest thus owned may be attached by garnishment of the corporation.[4] But in such cases the attachment is subject to any lien which the corporation may have, by virtue of the by-laws or constating instru-

[1] Ang. & Am. on Corp., §§ 557-559; Redf. on Rail. 38; Gilpin *v.* Howell, 5 Pa. St. 57; Tippets *v.* Walker, 4 Mass. 595; Johns *v.* Johns, 1 Ohio St. 350; Arnold *v.* Ruggles, 1 R. I. 165; Howe *v.* Starkweather, 17 Mass. 243.

[2] See Gue *v.* Canal Co., 24 How. 257; Ross *v.* Ross, 25 Ga. 297; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372; Western Pa. R. Co. *v.* Johnson, 59 Pa. St. 290; Stewart *v.* Jones, 40 Mo. 140; Denny *v.* Hamilton, 16 Mass. 402; Denton *v.* Livingston, 9 Johns. 96; Williamson *v.* Smoot, 7 Mart. (La.) 31; 2 Kent's Com. 285; Long on Sales, 2; New York *v.* Schuyler, 38 Barb. 534; S. C., 34 N. Y. 30; Anderson *v.* Nicholas, 28 id. 600; Bank *v.* Lanier, 11 Wall. 369.

[3] Green's Brice's Ultra Vires, 562.

[4] It is provided by the statute of Massachusetts, that any share of a stockholder, in any joint-stock company that is or may be incorporated, may be attached by leaving an attested copy of the writ (without the declaration), and of the return of the attachment with the clerk, treasurer or cashier of the company, if there be any such officer, otherwise, with any officer or person who has at the time the custody of the books and papers of the corporation; that any share of interest so attached shall be held as security to satisfy the final judgment in the suit in like manner as any other personal estate is held. Rev. Stat. Mass., ch. 90, § 36.

In Iowa, it is provided by statute as follows:

"Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows:

"1. By giving the defendant in the action, if found within the county and also the person occupying or in possession of the property, if it be in the hands of a third person, notice of the attachment.

"2. If the property is capable of manual delivery, the sheriff must take it into his custody if it can be found.

"3. Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached." Iowa Code (1873), § 2967. See, also, the same provisions relating to stock interests apply to executions. Id., § 3050.

ments.[1] It is evident that where there is a provision in the constating instruments, that all debts due to the corporation from a stockholder must be satified before any transfer of the stock held by him can be made, no creditor by attachment, or levy under an execution, could defeat the rights of such corporation to such lien, by virtue either of such attachment or levy, as the purchaser evidently could acquire no better right than the judgment-debtor had, and his right, as we have heretofore observed, in case of a sale and transfer of his interest would, in case of the limitation we have referred to, only carry with it, like any other chose in action, the equitable interest only of the assignor, such transfer of stock would be subject to the liens of the corporation, provided for by contract, by-laws, or by the constating instruments.[2]

On this subject Mr. Brice observes: "The right to subject stock in a corporation to sale on execution, not being given at common law, but being a statutory provision, the statute in such cases directs the mode of seizure and sale on exexution. Where, by charter or statutory enactments, a stockholder who is indebted

[1] Sewall *v.* Lancaster Bank, 17 S. & R. 285; Titcomb *v.* Union Ins. Co., 8 Mass. 326; Coleman *v.* Spencer, 5 Blackf. 197.

[2] "The rule that an assignor of stock may convey a title without paying what he owes to the company will not of course hold, if by the charter of the company it is provided that all debts due the company from a stockholder must be satisfied before any transfer of his stock shall be made." Ang. & Am., § 570.

And where it was provided by statute, that "no stockholder, indebted to the bank, shall be authorized to make a transfer, or receive a dividend till such debt shall have been discharged, or security to the satisfaction of the directors given for the same;" and a stockholder, who was indebted to a bank, not only for a balance of subscription to stock, but also for a discounted note, gave a power of attorney to the plaintiff to draw dividends and transfer the stock, and also money to pay the installments, which was thus applied, the supreme court of Pennsylvania held that the plaintiff was not entitled to a transfer of the stock, nor to a return of the money paid on installments, TILGHMAN, C. J., observing: "The words (of the act) embrace all debts, and there is good reason for their extending to all. When the directors discount the note of a stockholder, they know that his stock is liable, and, therefore, may be less attentive to the sufficiency of the indorsers. The indorsers, too, have an interest in the lien of the bank, and it may be presumed that many persons have been induced to indorse on the strength of this lien." Rogers *v.* Huntingdon Bank, 12 S. & R. 77.

And in Grant *v.* The Mechanics' Bank, 15 S. & R. 140, under a provision of an act of the state of Pennsylvania, which prohibited a transfer of stock by a stockholder "indebted" to the bank, it was held that a note given by the stockholder to the bank was a debt due from him to the bank before as well as after it became due, as the provision would fail of its intended benefit, if a stockholder had an unrestrained right to transfer at any time before his note fell due; and that the lien would remain, though the stock were levied upon by a judgment-creditor, for notes drawn before but falling due after the levy, even though they should be renewed.

can make no transfer until his debt is discharged, there can be no levy upon such stock unless it be subject to the lien of the corporation.[1] The method prescribed in the charter or statute for the sale of such stock must be pursued or the sale will be void. Where shares of stock in a corporation are made liable to levy and sale on execution, it is the interest the party has in the corporation that is sold, not the mere paper certificates, and if they are sold by the register number and in the name of the owner, that is a good sale."[2]

SEC. 415. **Appointment of receivers.** — The appointment of a receiver in various cases, where it is made apparent that the interests, especially of a judgment creditor, are in danger of being lost, or materially endangered or impaired without it, and where the interests of the adverse party will not be materially prejudiced thereby, is now the common subject of statutory provisions and regulations, and even without statutory provisions on the subject, it is one of the most efficient remedies in such cases, and within the proper jurisdiction of courts of equity, where an execution against a corporation is returned unsatisfied, or where there is nothing that can be levied upon but the mere franchise or easement from which income and revenue can be derived, and then only by the use of the same for the purposes for which the corporation was instituted.

The receiver, on his appointment in such cases, takes possession, charge, and control of the franchises and revenues, and applies the same to the satisfaction of the claim of the judgment creditor.[3]

On this subject, Mr. High, in his valuable treatise on Receivers, observes: "In most of the states of this country, as well as in England, the jurisdiction of courts of equity over corporations has been extended by legislative enactments to the appointing of receivers and the sequestering of the property of the corporation in proper cases, and in some of the states this jurisdiction has

[1] See *ante*, §§ 110, 136.

[2] Green's Brice's Ultra Vires, 562, 563. See, also, Sewall *v.* Lancaster Bank, 17 S. & R. 285; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; West Branch Bank *v.* Armstrong, 40 Pa. St. 278; Stamford *v.* Ferris, 17 Conn. 258; Howe *v.* Starkweather, 17 Mass. 240.

[3] Covington, etc., R. Co. *v.* Shepherd, 21 How. 112; Macon, etc., R. Co. *v.* Parker, 9 Ga. 393. As to the jurisdiction of courts of chancery to appoint, see High on Receivers, § 40 *et seq.*, and notes.

been enlarged by statute to the extent of winding up the affairs of the corporation, and the complete annihilation of its franchises. * * * It is to be observed in the outset, that the general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation, or of winding up its affairs and sequestering the corporate property and effects, in the absence of express statutory authority. And courts of equity will not, ordinarily, by virtue of their general equitable jurisdiction, or of their visitatorial powers over corporate bodies, sequester the effects of the corporation, or take the management of its affairs from the hands of its own officers and intrust it to the control of a receiver of the court, upon the application either of creditors or shareholders.[1] * * * Where the jurisdiction of courts of equity has been extended by legislation to the appointment of receivers over incorporated companies, the power thus conferred is treated by the courts as a delegated authority, the exercise of which requires the most careful consideration. The effect of appointing a receiver being to take the property of the corporation out of the control of its own officers, to whom it has been intrusted by its stockholders, the courts proceed with extreme caution in the exercise of so summary a power.[2] And in construing such statutes they are inclined to give them a strict construction, and require the prescribed method of obtaining jurisdiction of the person and the subject-matter to be strictly followed."[3]

SEC. 416. **Judgment creditor's right to a receiver.** — We have said that a common excercise of the powers of a court of equity was the appointment of a receiver. But this authority was not usually, if ever, exercised for the purpose of sequestering the effects of the corporation and closing up its affairs, but merely for the purpose of using the franchises, and, through the management and

[1] Citing Bangs *v.* McIntosh, 23 Barb. 591; Howe *v.* Deuel, 43 id. 504; Waterbury *v.* Merchants' Union Ex. Co., 50 id. 157; Belmont *v.* Erie R. Co., 52 id. 637; Neall *v.* Hill, 16 Cal. 145; Baker *v.* Administrator, etc., 32 Ill. 79. But a court of equity will generally refuse to appoint a receiver on the application of a stockholder on the ground of fraud, mismanagement or collusion on the part of the corporate authorities. Waterbury *v.* Merchants' Union Ex. Co., 50 Barb. 157; Neall *v.* Hill, 16 Cal. 145; High on Inj., § 288 and notes.

[2] Oakley *v.* Paterson Bank, 1 Green's Ch. 173.

[3] High on Receivers, 287–289. See also, Bangs *v.* McIntosh, 23 Barb. 591.

control of the corporate powers by the receiver, to secure the application of the revenues and net profits of the corporate business to the satisfaction of a judgment creditor, where satisfaction of his judgment could not be otherwise secured, and of which fact the return of the officer on an execution is usually sufficient evidence. But the proceeding in such cases is usually a matter of statutory regulation, and the power conferred thereby, as we have observed, may extend to the sequestration of the corporate property, and the closing up of the corporate business.[1]

SEC. 417. The general right of creditors in case of their inability to satisfy their claims by execution is illustrated by the opinion of the supreme court of the United States, in the case of *Covington Drawbridge Company* v. *Shepherd.*[2] The corporation in this case was created by an act of the state of Indiana, for the purpose of building a drawbridge over the Wabash river, in that state. Judgments were obtained against the corporation in the circuit court of the United States, in that state, and on execution a judgment creditor became the purchaser of the rents and profits of the bridge as real property, under the statutes of that state, for one year. He afterward, with other judgment creditors, filed a bill in the circuit court of the United States, and secured the appointment of a receiver, with authority to take possession of the bridge, collect the tolls and pay them into court, to be applied in satisfaction of the judgments of such creditors.

Upon appeal, in the supreme court of the United States, CATRON, J., in delivering the opinion of the court, observes: "By the laws of Indiana, lands and tenements cannot be sold under an execution until the rents and profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; and if that term or a less one will not satisfy the execution, then the debtor's interest or estate in the land may be sold, provided it brings two-thirds of its appraised value. The tolls, under the idea that they were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise and sole right in the

[1] High on Receivers, §§ 297, 298, citing Atlas Bank *v.* Nahant Bank, 23 Pick. 480. See, also, cases cited in the preceding section.

[2] 21 How. 112.

corporation, and the bridge a mere easement, the corporation not owning the fee in the land on either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge, as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws, should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation (owning no corporate property but this bridge), unless equity can afford relief. * * * All that we are called upon to decide in this case is, that the court below had power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls and pay them into the court, to the end of discharging the judgments at law; and our opinion is that the power to do so exists, and that it was properly exercised. It is, therefore, ordered that the decree below be affirmed, and the circuit court is directed to proceed to execute its decrees."

SEC. 418. Under the statutes of Wisconsin it was held that a judgment creditor of a corporation may, after execution is returned unsatisfied, in whole or in part, file a bill on behalf of himself and other creditors against not only the corporation but the delinquent stockholders, for an account of the assets and the appointment of a receiver.[1]

[1] Adler *v.* Milwaukee Pat. Brick Man. Co., 13 Wis. 57. See, also, Rev. Stat. Wis., §§ 18, 19, ch. 148, and same ch., § 15.

Mr. Redfield observes in reference to receivers as follows: "The rules of the courts of equity in regard to the office and agency of a receiver are very strict and stringent. The property while in his custody is regarded in legal contemplation as in the custody of the court. The assets are thenceforth in *gremio legis*, and cannot be seized by process from any other court. And, as a general thing, while a railway corporation is in the hands of a receiver, the receiver is regarded as the acting party and alone responsible to other parties who may receive injuries by the transaction of the business of the company, either by omission of duty or positive aggression. And, although the court will in most instances interfere for the protection of the receiver, on his request, that is not always done, especially where, as in some of the other states, railway corporations are kept in the hands of receivers through a succession of years.

And where the court of equity does not interfere to protect a receiver from his ordinary responsibility, measured by his acts, he will be

In the case just cited Chief Justice DIXON, after maintaining that the capital stock of a corporation, both that which is paid in and that which remains unpaid, is a trust fund pledged for the payment of the debts of the corporation, observes in reference to the powers of a court of equity to afford the requisite relief in such cases, as follows: "The practice in such cases, in those states where the mode of closing up the affairs of non-paying and insolvent corporations, and of distributing the proceeds of their property and effects among their creditors, is governed by the common law is, as indicated by the authorities to which reference has been made,[1] precisely that which was adopted by the appellant in this case. The creditor is first to establish his claim by a judgment at law, and then after execution issued and returned in whole or in part unsatisfied, he may file his bill in his own behalf and in behalf of such other creditors of the corporation as may elect to become parties thereto, against the corporation and its delinquent or withdrawing stockholders, alleging the recovery and non-payment of his judgment, and praying the decree or order of the court that an account of the assets and debts be taken and a receiver appointed, and that the stockholders and officers pay in and account to the receiver for so much of the capital stock as will be sufficient to pay the debt of the plaintiff, and those of such other creditors as may choose to join him and come in under the decree; and that the receiver be directed to apply the same in discharge thereof."

held responsible for all the acts and omissions of the corporation while under his sole control and management.

This subject underwent a very elaborate examination in the supreme court of Indiana, and the following propositions were maintained: That a railway with all its appurtenances was in the exclusive possession, use and control of a receiver appointed by a court of competent jurisdiction, who had the employment and control of all the hands upon the road; that the possession of the receiver could not be regarded as the corporation, neither could the company be held responsible for the acts of any servant or employee of the servant. The position of the corporation is more completely obscured and extinguished, so to speak, by the works being placed under the control of a receiver by compulsory proceedings in the courts than by any voluntary surrender of the road and its operations into the hands of lessees or mortgagees, where it has generally been held that the corporation may still be held responsible." 2 Redf. on Rail. 362; Ohio & Miss. R. Co. v. Davis, 23 Ind. 553.

[1] Spear v. Grant, 16 Mass. 9; Vose v. Grant, 15 id. 505; Wood v. Drummer, 3 Mason, 308; Ward v. Griswoldville Manuf. Co., 16 Conn. 593; Mann v. Pentz, 3 Comst. 415; Nathan v. Whitlock, 9 Paige, 152; Henry v. V. & A. R. Co., 17 Ohio, 187; Ogilvie v. Knox Ins. Co., 22 How. 380.

SEC. 421. It is the duty of the receiver, as the trustee of the various parties having an interest in the corporate affairs, and as the agent and instrument of the court, to act prudently in the management and settlement of the corporate affairs, acting under the direction of the court for the best interests of all concerned according to the best of his ability.[1] And when there are funds on hand to be divided among the creditors, this should ordinarily be brought into court and distributed under the direction of the court, to the parties entitled to it.[2]

"The first duty of receivers of insolvent corporations," observes Mr. High, "is to faithfully collect and justly disburse the assets of the corporation, which constitute the trust fund for the creditors. In the discharge of this duty they are properly vested with a certain degree of discretion, in the compromising and settlement of demands against the corporation; but, in the exercise of their discretionary powers, they should keep constantly in view the interests of those whom they represent, and for whom they act."[3]

But for a fuller consideration of this subject reference must be had to those treatises expressly devoted to it.

[1] If there is any doubt in the mind of the receiver as to the proper course of action or conduct, it is safe to apply to the court for directions. *In re* Van Allen, 37 Barb. 225.

[2] Benneson *v.* Bill, 62 Ill. 408.

[3] High on Receivers, § 334.

Receivers may decline to ratify a contract made by a corporation after its insolvency, if satisfied the ratification would result in loss, Id.; Suydam *v.* Receivers, 2 Green's Ch. 114; S. C., id. 276. See, also, Evans *v.* Trimountain Mut. Fire Ins. Co., 9 Allen, 329.

CHAPTER XVI.

AMALGAMATION AND CONSOLIDATION.

SEC. 423. **Amalgamation — meaning of, etc.** — The term "amalgamation" seems in England to be generally used in the place of consolidation in this country, and it has there been said to consist in making two companies into one; as, where two companies mutually agree to abandon their organization or association and reorganize a new one as one body.[1] It is affirmed in relation to amalgamation in England, that there is no implied power in corporations so to do, and, also, that a majority of the directors cannot authorize and consummate an amalgamation under a general authority to amalgamate, so as to bind the dissenting members to assume liabilities in the new organization. In such a case it was observed by the Vice-Chancellor *In re Empire Assurance Corporation, ex parte Bagshaw*, above cited, as follows: "It is possible that this authority may go thus far; it may empower the directors, without being called to account for so doing in this court, or by any other jurisdiction, to sacrifice or to give up (which implies something more) the whole of their business, and to transfer their assets, if they

[1] *In re* Bank Hindustan, etc., 2 H. & M. 666. See, also, *In re* Empire Assurance Corp., *ex parte* Bagshaw, L. R., 4 Eq. 341; 36 L. J. Ch. 663; 15 W. R. 889; 16 L. T. (N. S.) 345; Era Ass. Co., Williams' Case, 2 J. & H. 400.

think fit, to some other company to carry on the business on the best terms they can make with them. In carrying out this the directors may possibly be authorized to say, 'you who do not like this arrangement must simply lose; we have amalgamated one company with the other, * * * and we have placed all your assets in the hands of another concern.' But that does not imply that the dissentient shareholders, besides losing their assets, are personally bound to take part and lot in the new concern. It is one thing to say, 'Possibly you may find all the assets gone and your share of no value;' but it is a prodigious step further, to say, that the dissentient shareholder, having been concerned in an insurance company, shall be obliged to become subject to all liabilities of another company, which is not only an insurance company but a guaranty company, and a company for the purchase of houses and various other things as well."

SEC. 425. **The English doctrine relating to amalgamation.** — The recognized English doctrine on the subject of amalgamation is, as we have noticed, that a majority of the members cannot amalgamate, and transform shares from one association into another, as such a proceeding would be ultra vires.[1] But, it is there held, that where amalgamation cannot be legally effected in a direct manner, the object may be accomplished in an indirect manner. Thus, Mr. Brice observes: "It may do so by transferring its property, funds, rights and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding-up. Generally the arrangement is supplemented by a proviso, whereby a transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in

[1] Clinch v. Financial Corporation, L. R., 4 Ch. 117; Higg's Case and Martin's Case, 2 H. & M. 657; Los's Case 34 L. J. Ch. 609; London, etc., Bank, Drew's Case, 36 L. J. Ch. 785.

In the case first cited, B., a corporation, had agreed to purchase the good will of C., another corporation, and such agreement was confirmed at a special meeting of B. But the plaintiff, one of the stockholders in the corporation B., objected, and filed a bill against the other shareholders and directors to set aside the agreement. It was held that there was no special power in the constitution of corporation B., or in the provisions of the English act, (1862) relating to the subject, to authorize such a proceeding. See, also, Imperial Bank, etc., v. Bank of Hindustan, etc., L. R., 6 Eq. 91; London, etc., Corp., L. R., 4 Ch. 682; James v. Eve, L. R., 6 H. L. 335; Fremont v. Stone, 42 Barb. 169; Bliss v. Matteson, 52 Barb. 335; S. C., 45 N. Y. 22; Green's Brice's Ultra Vires, 512.

respect to claims, existing or prospective. This, after all, is not an amalgamation; it is not a union of one corporation with another, but is simply a transfer of assets, with attendant responsibilities. It is, however, a sufficient amalgamation for all practical purposes, and it is, therefore, the process always adopted."[1]

SEC. 426. **Doctrine in this country.** — The term *consolidation*, in this country, is generally used in the place of amalgamation in England. It is sometimes an organization or constitution of a new company out of two or more old ones, or a conveyance of the capital and rights of one or more to another, the latter continuing the business of all in its original corporate name, under stipulated arrangements, and in accordance with statutory provisions relating to the subject.

In the case of the consolidation of three companies, it has been observed that the effect of the consolidation "was a dissolution of the three corporations named, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence."[2] So, again it has been observed, that consolidation amounts to "a surrender of the old charters by companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new."[3] But where, by the provisions of the statute and by agreement, one corporation conveys all its property to another and is extinguished, this was held in Missouri not to be an amalgamation or consolidation of the two corporations into one.[4]

The general doctrine in this country seems to be, as in England, that there is no inherent power in a corporation, or implied authority in constating instruments, to authorize a corporation to amalgamate or consolidate with another or other companies. The reasoning against this power is, that as the charter is a contract between the state and the corporation, any alteration made there-

[1] Green's Brice's Ultra Vires, 513; Anglo-Australian Co. v. British, etc., Co., 3 Giff. 521; 4 De G., F. & J. 341. See, also, same principle in Hodges v. N. E. Screw Co., 1 R. I. 312; S. C., 3 id. 9; Booth v. Bunce, 33 N. Y. 139: Rorke v. Thomas, 56 id. 559; Barclay v. Quicksilver Mining Co., 9 Abb. Pr. (N.S.) 283; Same v. Same, 6 Lans. 25; Kelly v. Mariposa Mining Co., 11 N. Y. Sup. Ct. (4 Hun) 632.

[2] McMahan v. Morrison, 16 Ind. 172.

[3] Lauman v. Lebanon, etc., R. Co., 30 Pa. St. 42.

[4] Powell v. North Mo. R. Co., 42 Mo. 63.

in must be assented to by both parties, and hence the state must assent to any change of its purposes and powers.

SEC. 427. **Consolidation must be authorized by legislative authority.**— From what we have observed, it may be inferred that in order to make consolidation effective and valid, it must in all cases receive at least legislative assent. This may be given in the original charter, [1] or by general laws; and provision therefor may be made by general laws, or by a special act even after the organization of the original corporations. [2] But with what effect, where members or creditors dissent from the consolidation, we shall hereafter notice. The demand for the consolidation of railroad companies, not only in the various states, but with connecting lines in other states, has secured legislation for this purpose in most of the states. And in view of the manifest interest of stockholders and creditors, the American policy has favored general statutes on this subject, providing for consolidation of continuous lines of railroads owned by different companies, created even in different states. And where such authority is not provided, the same object has partially been accomplished by leasing such railroad lines. [3]

SEC. 428. **Where legislative authority is conferred after the creation of the corporation.** — Where the legislative authority is conferred after the charters have been granted to the consolidating companies, or after they have organized under general laws, it has been held that the constating instruments become an inviolable contract not only between the state and the corporation, but between the cor-

[1] Clearwater v. Meredith, 1 Wall. 25; Nugent v. Supervisors, 19 id. 241.

[2] Black v. Delaware, etc., Canal Co., 9 C. E. Green, 455; Bishop v. Brainerd, 28 Conn. 289. See, also, Pearce v. Madison, etc., R. Co., 21 How. 441; Fisher v. Evansville, etc., R. Co., 7 Ind. 407.

[3] For general statutes of various states on the subject of consolidation, see Iowa Code (1873), 233, § 1275; Wagner's Missouri Statute, 314, § 56; Laws of Kansas (1870), ch. 92, § 1, p. 195; California Code, 10; Rev. Stat. Col., ch. 18, § 57, p. 137; Gen. Stat. Neb. 196, § 114; Compiled Laws Nev. (1873), Vol. 2, p. 301, § 3465; Webb's Railroad Laws of Me. 87; Edmonds' N. Y. Stat. at Large, p. 529; Laws of N. J. (1873), ch. 413, § 17, p. 98; Brightley's Purdon's Dig. (Laws of Pa.) 1222–1226; Battle's Rev. St. N. C., p. 749; Rev. Stat. S. C. 368; Sess. Laws Ala. 1869–70, 318; Rev. Stat. Ky. (Stanton), Vol. 2, p. 548; Stat. Tenn. 1140; Rev. Stat. Ohio (Curwin), pp. 1882, 2791; Wilcox's R. R. Laws, Ohio, p. 134; Gen. Stat. Ind., Vol. 3 (Davis' Supp.), p. 399; Rev. Stat. Ill. (1874), pp. 294, 295; Gilbert's R. R. Laws of Ill., p. 229; Compiled Laws Mich., ch. 75, p. 812, § 41; Rev. Stat. Minn., ch. 34, p. 269; Edgerton's R. R. Laws of Minn., p. 19.

poration and its members; and that, in the absence of authority conferred at the time, or previously thereto, the corporation cannot change the nature and purposes of the corporation, even with the assent of the legislature subsequently given, without the unanimous assent of the stockholders. The legislature cannot, in such a case, authorize a majority of the corporation to make a contract to consolidate with another corporation, against the will of a minority, as it would impair, in such a case, the obligation of the contract. In relation to this subject and the rights of stockholders in such cases, in a recent case in the supreme court of Maryland, it was observed: "As stockholders they own the road in common to be employed for specified uses. Each owns a share in the whole, and is to have a proportionate share in its profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road and in every dollar it earns. The directors are their trustees to employ their joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen, they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that the money shall be so employed. What the majority determine within the scope of this mutual contract they each agree to abide by; but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not consistent with, and growing out of this original fundamental joint intention. To sell the road, to abandon the contemplated investment and embark in another scheme, whether entirely different or only more extensive than the original contemplation, as apparent on the face of the charter, is, it it seems to me, clearly contrary to the rights of the individual stockholders."[1]

SEC. 429. The doctrine sustained by principle seems to be that the corporate contract and the vested rights of stockholders under the same cannot be affected by legislative authority authorizing any change of its original purposes or business. The stockholders have entered into a contract, and assumed obligations, under legislative sanction, to expend money in a manner mutually

[1] Kean v. Johnson, 1 Stockt. 401.

agreed upon, and an objecting stockholder should not be compelled to engage in a new and a different enterprise;[1] and a dissenting stockholder may prevent consolidation or amalgamation of the corporation of which he is a member with any other, unless such a condition is a part of the contract entered into by him.

SEC. 430. **Difficulty removed by the exercise of the right of eminent domain.** — The difficulty in effecting consolidations of railroad companies under the circumstances indicated in the preceding section has been, in some cases, obviated with corporations having duties to perform to the public, by the exercise of the power of eminent domain. On this subject, generally, Mr. Cooley observes: "Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain. Lands for the public ways; timber, stone, and gravel with which to make or improve the public ways; buildings standing in the way of contemplated improvements, or which for any other reason it becomes necessary to take, remove, or destroy for the public good; streams of water; corporate franchises; and generally, it may be said, legal and equitable rights of every description are liable to be thus appropriated."[2]

SEC. 431. It is claimed that the stock of an individual is just as subject to the claim of eminent domain as any other property; that rail corporations have duties to perform to the public, and that if one unwilling stockholder should be permitted to obstruct the growth and development of every railroad enterprise

[1] Black *v.* Delaware, etc., Canal Co., 9 C. E. Green, 455. See, also, Lauman *v.* Lebanon, etc., R. Co., 30 Pa. St. 46. where LOWRIE, J., in considering the rights of a dissentient stockholder. says: "He may object that his co-corporators have no power to make a new contract for him, and thereby constitute him a member of a new and a different corporation. * * * He may object even that the legislature cannot authorize this, for by so doing they would authorize the destruction of one private contract, and the compulsory creation of another in its stead, and would take away the remedy by due course of law, which the dissenting stockholder is entitled to, because of the departure or diversion of the association from its agreed purposes; and would, besides this, change the essential nature of contracts, which even legislative power cannot do, and much less legislative authority."

See, also, Clearwater *v.* Meredith, 1 Wall. 25; Nugent *v.* Supervisors. 3 Biss. 105; S. C., 19 Wall. 241; McMahan *v.* Morrison, 16 Ind. 172; Mowrey *v.* Ind. & Cinc. R. Co., 4 Biss. 78.

[2] Cooley on Const. Lim. 526.

in which he may have participated, and hinder their union under one management, when the interests of commerce and of the stockholders and creditors, and public convenience and policy may require it, the government would fail to discharge its duty if it should not exercise this right. On this subject in a recent case in New Jersey, VAN SYCKEL, J., observed as follows: "In the exercise of the right of eminent domain, the legislature may authorize shares in corporations and corporate franchises to be taken for public uses, upon just compensation. The title to this species of property is no more secure against invasion when the public use requires it, than is the ownership of real estate. Under this paramount right in the public, subject to which all private property is held, the franchises of one corporation have been, and may be taken and bestowed upon another. * * * When authority is granted for the consolidation of existing connected routes, the presumption flows, from the fact of the enactment being made, that the legislature decided upon its necessity. This results from the familiar rule that every intendment will be made in support of the constitutionality of the acts of a co-ordinate branch of the government."[1]

But where this doctrine is recognized it is evident that a just compensation should be allowed the party whose stock is taken under such right.[2] And it may be affirmed that in all cases where

[1] Black v. Delaware, etc., Canal Co., 9 C. E. Green, 455.

[2] Lauman v. Lebanon, etc., R. Co., 30 Pa. St. 42; Fisher v. Evansville, etc., R., 7 Ind. 407; McCray v. Junction R. Co., 9 id. 358; State v. Bailey, 16 id. 46; Shelbyville, etc., T. Co. v. Barnes, 42 id. 498; Illinois G. T. R. Co. v. Cook, 29 Ill. 237; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42.

It is generally conceded that the condemnation of property and interests, under this power of eminent domain, is a right which exists in the sovereign power only where some public use and benefit is to be subserved. But what is a public benefit or use?

On this subject Mr. Cooley observes: "We find ourselves at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use." Cooley on Const. Lim. 531. And Chancellor WALWORTH has said: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose. It is upon this principle that the legislatures of several of the states have authorized the condemnation of lands of individuals for mill sites, when from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also in-

a consolidation is effected, unless the power so to do existed at the time the contract between the corporation and the stockholder was entered into, even through the exercise of the power of eminent domain, it will relieve a dissenting stockholder from his subscription, and must entitle him to recover the value of his interest in the corporation, as it existed at the time of the exercise of this power.[1]

SEC. 432. **Where authority for consolidation exists at the time of the creation of the corporation.** — If authority is contained in the charter or general act under which the corporation was organized, or where authority is subsequently given either by a general or a special statute, but before the contract of subscription is entered into, it not only authorizes a consolidation according to the terms and provisions of the act, but precludes any objection on the part of the stockholders to the consolidation. The terms and conditions of the consolidation, and the rights and privileges of the stockholder in such cases, may depend upon the provisions of the statute or other constating instruments. These may provide for the concurrence requisite to consummate a consolidation, either by

dividuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike-roads and canals, of erecting and constructing wharves and basins, of establishing ferries, of draining swamps and marshes, and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public advantage expected from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government or through the medium of corporate bodies or of individual enterprise." Beekman *v.* Saratoga & Schenectady R. Co., 3 Paige, 73. See, also, Cooley's Const. Lim. 532 *et seq.*; also, on the subject of public interest in case of eminent domain, *post*, § 441 *et seq.*

[1] Carlisle *v.* Terre Haute, etc., R. Co., 6 Ind. 316.

Where a public use or benefit is to be accomplished, a change in the objects and purposes of the corporate enterprise may be enforced by the legislature, provided compensation is made for the interest of dissenting stockholders. Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. 360; Springfield *v.* Connecticut River R. Co., 4 Cush. 63; Central Bridge Co. *v.* City of Lowell, 4 Gray, 474; West River Bridge *v.* Dix, 6 How. 507; Richmond R. Co. *v.* Louisa R. Co., 13 id. 71; White River Turnp. Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Crosby *v.* Hanover, 36 id. 404; Tide Water Canal Co. *v.* Coster, 3 C. E. Green, 521; Matter of Drainage, 6 Vroom, 497; Black *v.* Delaware, etc., Co., 9 C. E. Green, 455; Chesapeake, etc., R. Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1; New Castle R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464; Enfield Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40.

the corporators or the directors, and what the rights of stockholders shall be in that event.[1]

SEC. 433. **Rule as to the concurrence required where no provision is made therefor.** — If authority to consolidate is given, and no express provision made as to the mode or the concurrence requisite to accomplish this purpose, it could undoubtedly be accomplished by the corporate body in the usual way of corporate action, and in such a case the concurrence of a majority of the members would be sufficient to accomplish the purpose.[2]

SEC. 434. **The powers of the new corporation, created by the consolidation.** — By consolidation the old companies cease and a new one

[1] The general rule, as well as the distinction referred to, has been illustrated by the opinion of the supreme court of the United States in the case of Nugent *v.* Supervisors, 19 Wall. 241, in which an attempt was made to avoid a subscription on the part of a county in the state of Illinois to the stock of a corporation, on the ground of a subsequent consolidation of such company with another. But an authority to consolidate existed at the time of the creation of the company, by an act of that state approved Feb. 28, 1854. The court say: "It must be conceded as a general rule that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from his liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain a company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no application to a case like the present. The consolidation * * * was no departure from its original design. The general statute of the state * * * authorized all railroad companies, then organized or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the state, whenever their lines connect with the lines of such companies out of the state. * * * The American authorities uniformly assert that the subscriber for stock is released from his subscriptions by a subsequent alteration of the origanization or purposes of the company, only, when such alteration is both fundamental and not provided for or contemplated by either the charter itself or the general laws of the state."

See, also, Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30, where it was held that, as one of the purposes for which the corporation was organized was to consolidate, it would be presumed that the subscriber might have reasonably anticipated such a result, and he was held bound by his subscription. See, also, Hamilton *v.* Hobart, 2 Gray, 543; Gardner *v.* Hamilton Ins. Co., 33 N. Y. 421; Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Bish *v.* Johnson, 21 id. 299; Mowrey *v.* Indiana, etc., R. Co., 4 Biss. 78; Blatchford *v.* Ross, 54 Barb. 42.

[2] See Black *v.* Delaware, etc., Canal Co., 7 C. E. Green, 130; Zabriskie *v.* Hackensack & N. Y. R. Co., 3 id. 178; McVicker *v.* Ross, 55 Barb. 247.

is created, and usually the property and the rights and liabilities of each pass to the new company.[1] But it is evident that the franchises, that would pass to the new company, would be only such as would be necessary for the exercise of the powers and privileges conferred upon it by the new organization.[2]

In a case where there was a lawful consolidation of two railroad companies, under the laws of Indiana, and a suit was brought against the consolidated company for an injury done by one of the original companies, the supreme court of that state said: "by the consolidation both the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the Indianapolis and Cincinnati Railroad Company [the company originally liable] could afterward be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court. But what are the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A dead man may have an administrator to represent his estate and answer to suits, but a corporation, lawfully disappearing thus, has no estate to be administered. Its assets must have vested in the new consolidated corporation. Must lawful claims be lost then? That result cannot follow. The legislature has chosen to make no provision upon the subject, and the industry of counsel as well as our own examination of the books has failed to discover any direct authority upon the question before us. The analogies of the law too afford little aid in its solution. * * * Giving it, however, the best consideration we were capable under the circumstances we have reached the conclusion

[1] Miller v. Lancaster, 5 Cold. 514; Paine v. Lake Erie R. Co., 31 Ind. 283; Columbus, etc., R. Co. v. Powell, 40 Ind. 37.

[2] As to effect of exemption from taxation of one of the old companies, see Philadelphia, etc., R. Co. v. Maryland, 10 How. 376; Tomlinson v. Branch, 15 Wall. 460. See, also, in reference to special rights enjoyed by one of the original companies, Shaw v. Norfolk, 16 Gray, 407; Bishop v. Brainerd, 28 Conn. 289; Fisher v. New York C. R. Co., 46 N. Y. 644; Robertson v. Rockford, 21 Ill. 457; Commonwealth v. Atlantic, etc., R. Co., 53 Pa. St. 9; New Jersey M. R. Co. v. Strait, 6 Vroom, 322.

that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name."[1]

SEC. 435. **Doctrine as to the rights of creditors of the consolidating companies.** — It is a general doctrine that, where the power to consolidate exists, the right so to do, in accordance with the mode authorized by law, cannot be defeated by the creditors of the consolidating corporations.

And the general rule is, that the rights of creditors against the old companies revive against the new one, created by the consolidation, as we have just noticed, and that it becomes substituted for the former ones. Provision is perhaps generally made by statute or by articles of agreement, as provided by law, for the payment of the creditors and the satisfaction of the obligations of the consolidating companies;[2] and sometimes these provide that such companies shall continue for the purpose of adjusting their outstanding obligations, including their torts.[3] But even where no such provision is made, but the consolidation is lawfully consummated, the new company has been held liable to all obligations of the former ones, from the very necessity of the case, and to prevent the failure of justice;[4] or as the trustee of the debtor corporation, on account of having its funds, which must be held for the payment of its debts, and which are properly chargeable in whosoever hands they may be, exept a *bona fide* holder for value, with the satisfaction of the same.[5]

SEC. 436. **Consolidation of corporations organized in different states.** — Questions as to the status of the consolidated company have

[1] Indianapolis C. & L. R. Co. *v.* Jones, 29 Ind. 465; 1 With. Corp. Cas. 351.

[2] Prouty *v.* Lake Shore, etc., R. Co., 52 N. Y. 363.

[3] Selma, etc., R. Co. *v.* Harbin, 40 Ga. 706.

[4] Indianapolis, etc., R. Co. *v.* Jones, 29 Ind. 465; Paine *v.* Lake Erie, etc., R. Co., 31 id. 283; Columbus, etc., R. Co. *v.* Powell, 40 id. 37.

[5] Eaton & Hamilton R. Co. *v.* Hunt, 20 Ind. 463; Powell *v.* North Missouri R. Co., 42 Mo. 63.

been raised principally in reference to its domicile and the jurisdiction of the federal courts in cases in which it is a party. The general doctrine is, that for the purpose of conferring jurisdiction, it may be sued in the state where its principal office and its records are kept.[1] We have already considered the character of corporations as citizens, and the question as to their domicile, under the provision of the constitution of the United States, and the acts of congress relating to the judicial powers and jurisdiction of its courts, and the removal of causes from the state to the federal courts.[2] In reference to this question it is held, that in case of the lawful consolidation of corporations created in different states, "the jurisdictional effect of the existence of such a corporation, as regards the federal courts, is the same as that of a copartnership of individual citizens residing in different states."[3]

SEC. 437. Where there was a consolidation of the stock of a railroad company created in Wisconsin, with one in Illinois, but in so consolidating they failed to pursue the terms of their charters, but the contract of consolidation was subsequently confirmed by an act of the legislature of the state of Illinois, it was held that it was recognized as a corporation of that state, and that a mortgage subsequently executed by the directors in the name of the consolidated company, conveying the property of the corporation in the state of Illinois, was valid as a mortgage of the Illinois corporation.

In reference to the effect of the consolidation in this case, Mr. Justice LAWRENCE remarks: "While it created a community of stock and of interest between the two companies, it did not convert them into one company in the same way and to the same degree that might follow a consolidation of two companies within the same state. Neither Illinois nor Wisconsin, in authorizing consolidation, could have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither state

[1] Culbertson *v.* Wabash Nav. Co., 4 McLean, 544; Jenkins *v.* California Stage Co., 22 Cal. 537.

The same rules generally prevail in reference to the venue of suits as in case of natural persons. See Central Bank of Georgia *v.* Gibson, 11 Ga. 453; Speer *v.* Atlanta, etc., R. Co., 30 id. 135; Edwards *v.* Union Bank, 1 Fla. 136; Cincinnati, etc., R. Co. *v.* Knowlton, 11 Ind. 339; Thorn *v.* Central R. Co., 26 N. J. L. 121.

[2] See *ante*, ch. 13.

[3] Railroad Company *v.* Harris, 12 Wall. 65. See, also, Railroad Co. *v.* Whitton, 18 id. 270.

could take jurisdiction over the property or proceedings of the corporation beyond its own limits. * * * A corporation cannot be created by the co-operating legislation of two states so as to be the same legal identity in both states; and where two states have each created a corporation with the same name, for the same purposes, and composed of the same natural persons, it must, nevertheless, be considered as a distinct corporation in each state." [1]

[1] Racine, etc., R. Co. *v.* Farmers' Loan & T. Co., 49 Ill. 331; McGregor *v.* Erie R. Co., 6 Vroom, 115. See, also, State *v.* Metz, 3 id. 199; Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613; Attorney-General *v.* Boston, etc., R. Co., 109 Mass. 99; Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233; Allegheny Co. *v.* Cleveland, etc., R. Co., 51 Pa. St. 228; Cleveland, etc., R. Co. *v.* Speer, 56 id. 325; Commonwealth *v.* Pittsburg, etc., R. Co., 58 id. 26; State *v.* Northern Cent. R. Co., 18 Md. 193; Baltimore, etc., R. Co. *v.* Glenn, 28 id. 287; Goshoen *v.* Supervisors, 1 W. Va. 308; Baltimore, etc., R. Co. *v.* Supervisors, 3 id. 319; Farmers' Bank *v.* Gettinger, 4 id. 305; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 658; Aspinwall *v.* Ohio, etc., R., 20 Ind. 492; Union, etc., R. Co. *v.* East Tenn. R. Co., 14 Ga. 327; Attorney-General *v.* Railroad, 35 Wis. 425.

CHAPTER XVII.

EMINENT DOMAIN.

SEC. 438. **What the right of eminent domain is.** — The right of eminent domain, as applicable to private corporations, is the power which exists in the state as the sovereign authority, to appropriate the property of individuals for the public benefit, when the public safety, convenience, or welfare may require it, and on due compensation being rendered therefor to the owner.

The doctrine is sometimes claimed to rest upon an implied reservation in the sovereign authority, from which, so far as rel. tes to real estate, the individual rights are derived, to resume the rights thus conferred in the contingencies referred to. And it consists, not only in the authority to resume the whole estate, but any right or interest therein. "It is the rightful authority," observes Mr. Cooley, "which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property as the public safety, necessity, convenience or welfare may demand."[1]

The constitution of the United States and of the various states, inhibits the taking of private property for public purposes,

[1] Cooley on Const. Lim. 524 and note; 2 Kent's Com. 338, *et seq.;* Pallard's Lessees v. Hagan, 3 How. 223; Beekman v. Saratoga, etc., R. Co., 3 Paige, 45.

under the right of eminent domain, without just compensation;[1] but the right of the sovereign to appropriate individual property, under the circumstances referred to, seems to be generally recognized, and to be acknowledged in the jurisprudence of all civilized people.[2]

This right of eminent domain, as we have seen, is not limited to the real estate of individuals and natural persons, but may extend to and be exercised in reference even to the property and rights, franchises and easements of corporations, however exclusive the grant may be, provided, however, that in all cases, adequate compensation be first made therefor.[3]

[1] Amend. Const. U. S., art. 5; Vattel, B. 1, ch. 20, § 244.

[2] Field on Dam., § 845. See, also, Brown *v.* Beatty, 34 Miss. 227; Taylor *v.* Porter, 4 Hill, 143; HOGEBOOM, J., in People *v.* Mayor, etc., N. Y., 32 Barb. 112; Heyward *v.* Mayor, etc., N. Y., 7 N. Y. 314.

In the case of Beekman *v.* Saratoga, etc., R. Co., *supra*, Chancellor WALWORTH observes: "Notwithstanding the grant to individuals, the highest and most exact idea of property remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest or even the expediency of the state is concerned, or where the land of the individual is wanted for a road, canal or other public improvement."

[3] Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Northern R. Co. *v.* C. R. Co., 7 Fost. 183; State *v.* Canterbury, 8 id. 195; Crosby *v.* Hanover, 36 N. H. 404; Cooley on Const. Lim. 526 and notes.

In relation to the condemnation of the rights of private corporations acquired under and by virtue of the charter and contract with the state, see West River Bridge Co. *v.* Dix, 6 How. 507; S. C., 16 Vt. 446; Richmond R. Co. *v.* Louisiana R. Co., 13 id. 71; Binghamton Bridge Case, 3 Wall. 51; Boston & Lowell R. Co. *v.* Salem & Lowell R. Co., 2 Gray, 1; Bridge Co. *v.* Lowell, 4 id. 474; Boston Water Power Co. *v.* Boston & Wor. R. Co., 23 Pick. 360; Springfield *v.* Connecticut R. Co., 17 Conn. 40; id. 454; *In re* Kerr, 42 Barb. 119; Bridge Co. *v.* Hoboken Co., 2 Beas. 81; Shorter *v.* Smith, 9 Ga. 529; Railroad Co. *v.* Kenney, 39 Ala. (N. S.) 307; California Telegraph Co. *v.* Alta Telegraph Co., 22 Cal. 398; Illinois & Mich. C. Co. *v.* Chicago & R. I. R. Co., 14 Ill. 321.

In the West River Bridge case, *supra*, DANIEL, J., says: "No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of government; they reach and comprehend, likewise, the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

"The constitution of the United States, although adopted by the sovereign states of this union, and proclaimed

By virtue of this supreme power of the state, timber, gravel, or stone may be taken,[1] and buildings removed or destroyed.[2] So

in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states; there is no express delegation of it by the constitution, and it would imply an incredible fatuity in the states to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in nowise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

"Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only in the original nature of tenure that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis the law of property would be simply the law of force. Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control as conditions inherent and paramount wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and, therefore, inconsistent with and violative thereof. It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the first article of the constitution, it remains with the states to the full extent in which it inheres in every sovereign government to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the constitution; shall avoid interference with the obligation of contracts, the wisdom, the mode, the policy, the hardship of any exertion of this power, are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and conceding the power to re-

[1] Watkins v. Walker Co., 18 Tex. 585; Wheelock v. Young, 4 Wend. 647; Lyon v. Jerome, 15 id. 569; Jerome v. Ross, 7 Johns. Ch. 315; Bliss v. Hosmer, 15 Ohio, 44.

[2] Wells v. Somerset, etc., R. Co., 47 Me. 345.

may legal and equitable interests, streams of water,[1] corporate franchises, and every species of property be appropriated under this right.[2]

side in the state government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power in some mode or other from the very foundation of civil government have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed. In our country it is believed the power was never, or at any rate rarely, questioned until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons resting upon the ordinary foundations of private right there would seem to be room neither for doubt nor difficulty. A distinction has been attempted in argument between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons in the use or enjoyment of their private property to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating in his second volume, c. 3, p. 26, of the 'Rights of Things.' It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyments. *Vide* Bl. Com., vol. 3, c. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position with respect to the paramount power and duty of the state to promote and protect the public good as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the constitution and no violation of a contract. The power of a state in the exercise of eminent domain to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term Reports, 794, and Lord KENYON, especially in that case, founded solely upon

[1] People *v.* Mayor, etc., of N. Y., 32 Barb. 102; Bailey *v.* Miltenberger, 31 Pa. St. 37; Gardner *v.* Newburgh, 2 Johns. Ch. 162.

[2] Cooley on Const. Lim. 526; Springfield *v.* Connecticut Riv. R. Co., 4 Cush. 63.

In the latter case the court held, that it was competent for the legislature, under the right of eminent domain, to grant an authority to a railroad company to lay and maintain a railway over a highway, longitudinally; but that the intention to grant land, already appro-

SEC. 439. **How the right can be enjoyed.** The right of eminent domain is an incident of sovereignty, and can only be enjoyed by

this power the entire policy and authority of all the road and canal laws of the kingdom."

And in the same case Mr. Justice MCLEAN says: "The state cannot modify or repeal a charter for a bridge, a turnpike-road, or a bank, or any other private charter, unless the power to do so has been reserved in the original grant. But no one doubts the power of the state to take a banking-house for public use, or any other real or personal property owned by the bank. In this respect, a corporation holds property subject to the eminent domain, the same as citizens. The great object of an act of incorporation is to enable a body of men to exercise the faculties of an individual. Peculiar privileges are sometimes vested in the body politic, with the view of advancing the convenience and interests of the public.

"The franchise, no more than a grant for land, can be annulled by the state. These muniments of right are alike protected. But the property held under both is held subject to a public necessity, to be determined by the state. In either case, the property being taken, renders valueless the evidence of right. But this does not in the sense of the constitution impair the contracts. The bridge and the ground connected with it, together with the right of exacting toll, are the elements which constitute the value of the bridge. The situation and productiveness of the soil constitute the value of land. In both cases an estimate is made of the value, under prescribed forms, and it is paid when the property is taken for public use. And in these cases the evidences of right are incidents to the property. No state could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken and the business of the bank continued for public purposes. Nor could this bridge have been taken by the state, and kept by it as a toll-bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised *bona fide* by a state, but the property, not its product, must be applied to public use.

"It is argued that if the state may take this bridge, it may transfer it to other individuals under the same or different charter. This the state cannot do. It would be, in effect, taking the property from A. to carry it to B. The public purpose for which the power is exerted must be real and not pretended. If, in the course of time, the property, by a change of circumstances, should no longer be required for public use, it may be otherwise disposed of. But this is a case not likely to occur. The legality of the act depends upon the facts and circumstances under which it was done. If the use of land taken by the public for a highway should be abandoned, it would revert to the original proprietor and owner of the fee."

priated to a public use, must be shown by express words or by necessary implication.

In this case Chief-Justice SHAW observes:

"We are then brought to the main question, namely, whether the defendants had authority, by the act of 1845, ch. 170, § 1, granting them the right to build this branch, to built it over and along a public way previously established. It is stated and admitted, that Front street, in Cabotville, is partly a highway, laid out and established by the county commissioners, and partly a townway, laid out by the selectmen, and the laying out ratified by the vote of the town. These two modes of establishing ways are both legal; and though one is called a highway, and the other a townway, yet, for most purposes, both are regarded as public ways, for obstructing which any party is liable to indictment, as for a nuisance, and for damage in consequence of any defect in which the town is liable to the sufferer. For all purposes of this inquiry, there-

the exercise of legislative authority. The right may, however, be conferred by the legislature, representing the supreme author-

fore, there is no distinction between them.

"As the giving of authority to build and maintain a railroad is the grant of a right to take private property for a public use, and to deal with property appropriated to other public easements and uses, it is manifestly a high exercise of the sovereign right of eminent domain, and can only be effected by the clear and unequivocal authority of the legislature, who are constituted the judges of what the public good requires.

"It is somewhat remarkable that, in a matter so deeply affecting private rights and interest, the precise location or line of railroad on the ground is not fixed by the act granting the power, nor is it provided that it shall be fixed by any board of public officers, who may be supposed to act impartially. In laying out highways, the precise course of location is fixed by the county commissioners, formerly the court of sessions, a public body of disinterested officers, supposed to act as impartial arbitrators between the public and individual proprietors.

"But in railroads, the authority to the corporation is to locate, construct, and complete a railroad within certain termini, giving the general direction, but leaving the precise location to be determined, not by the county commissioners, but by the company. The corporation must file their location with the commissioners within one year, defining the courses, distances, and boundaries, but the commissioners have no power of prescribing or altering it. Rev. Sts., ch. 37, § 75. So, after having made a location, the corporation may vary it, and take other lands within the limits prescribed by their act of incorporation, and file a location of such variations. Rev. Sts., ch. 39, § 73. And, on the petition of any railroad corporation, the commissioners may authorize an original location, or an existing location, to be altered, without the limits prescribed by the charter of such corporation. Rev. Sts., ch. 39, § 74. Considering how large the powers are which are thus vested in railroad corporations, the court are of opinion that they ought to be construed with a good degree of strictness, and not enlarged by construction.

"The authority, under which the defendants claim to have located and laid out the railroad in question, is found in the act of 1845, ch. 170, which was passed in addition to the act of 1842, ch. 41, by which this company was incorporated. The act of 1845 provides (§ 1) that the company may construct and open for use a branch railroad from the main track of the road, in Cabotville, to and near the mills in said village, passing up the south bank of Chicopee river, near the same, and thence extending up said river to the Chicopee Falls village; the location of that part of the branch now in question, from the main road to the mills in Cabotville, to be filed in one year from the passage of the act, and that to Chicopee Falls village in five years. The act further provides (§ 3) that said corporation, in the construction of their railroad and branch, shall have all the powers and privileges, and be subject to all the duties, restrictions, and liabilities set forth in the Rev. Sts., ch. 44, and in that part of ch. 39 which relates to railroads.

"It is the common case of an act, authorizing the location and construction of a railroad between termini, one of which, the junction, as the *terminus a quo* is fixed, and the other, the *terminus ad quem*, 'to and near the mills in Cabotville;' and the course or line is no more exactly designated than by the terms, 'passing up the south bank of Chicopee river, and near the same,' and thence extending up said river to Chicopee Falls village. The beautiful and apparently accurate survey and plan of a part of Cabotville, and of the river, the streets, and the track of the railroad, exhibit all these localities to great advantage, and present the question at a single glance.

"As no company or persons have authority to lay out a railroad, except so far as such power is conferred by the legislature, the court are of opinion that, by a grant of power by a legislative act, to lay out a railroad between certain termini, where the precise course and direction are not prescribed, but are left to the corporation to be located between the

ity of the state; and authority is usually conferred by it, by some general statutes, upon corporations, by means of which delegated authority such corporations, constituted for various purposes, are enabled to prosecute various enterprises of public as well as of private interest.[1] The right to delegate this authority rests upon

termini, no authority is given *prima facie* to lay such railroad on and along an existing public highway longitudinally, or, in other words, to take the road-bed of such highway as the track of their railroad. The two uses are almost, if not wholly, inconsistent with each other; so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated. The whole course of legislation, on the subject of railroads, is opposed to such a construction. The crossing of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made to regulate such crossings by determining when they shall be on the same and when on different levels, in order to avoid collision; and when on the same level, what gates, fences, and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant, should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travelers on both. The absence of any such provisions affords a strong inference that, under general terms, it was not intended that such a power should be given.

"But the court are of opinion, that it is competent for the legislature, under the right of eminent domain, to grant such an authority. The power of eminent domain is a high prerogative of sovereignty, founded upon public exigency, according to the maxim: *Salus reipublicæ lex suprema est*, to which all minor considerations must yield and which can only be limited by such exigency. The grant of land for one public use must yield to that of another more urgent. Land appropriated to a public walk or training-field may, in case of war, be required for a citadel, when it is the only ground which, in a military point of view, will command all the defenses of a place, in case of hostile attack. Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio Railroad Co., 4 Gill & Johns. 1; Boston Waterpower Co. *v.* Boston & Worcester Railroad Corp., 23 Pick. 360; Wellington *et al.*, Petitioners, 16 id. 87, 100.

"But when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words, or by necessary implication. There may be such a necessary implication. Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object; and carries with it such incidental powers as are requisite to its exercise. If, then, the exercise of the power granted draws after it a necessary consequence, the law contemplates and sanctions that consequence. Take the familiar case of the Notch of the White Mountains, a very narrow gorge, which affords the only practicable passage for many miles through that mountain range. A turnpike road through it has already been granted. Suppose the gorge not wide enough to accommodate another road, but the legislature of New Hampshire, in order to accommodate a great line of public travel, should grant power to lay a railroad on that line, they would, by necessary implication, grant a power to take some portion of the road-bed of the turnpike."

[1] Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100.

Mr. Dillon, on the subject of the power of the legislature to delegate the authority to exercise the right of eminent domain to corporators

the supposed public benefit to be derived from the exercise of the power by the corporation on which it is conferred. "Upon the principle of public benefit," observes Chancellor WALWORTH, "not only the agents of the government, but also individuals and corporate bodies have been authorized to take private property for the purpose of making highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes, and of bringing water to cities and villages. In all such cases, the object of the legislative grant of power is the public advantage expected from the contemplated improvement or enterprise whether it be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise." [1]

SEC. 440. **The authority to grant the right is in the legislature.** — The authority to grant the exercise of the right of eminent domain resides in the legislature as the representative of the state. It is a legislative function to determine whether the enterprise undertaken on the part of an individual or a corporate body is of sufficient public interest and utility to justify the transferring of the sovereign power to take private property for the purpose of carrying out such enterprise.[2]

observes: "The legislature, instead of directly exercising the power to take private property for public use, may delegate it, attended, however, by its constitutional restrictions, to private corporations organized for public purposes, and of course, therefore, to municipal corporations, which are, for all purposes of local government, essentially public in their nature and ends; and it may also confer upon them the right to decide upon the existence of the necessity of its exercise. Thus, a municipal corporation may be constitutionally invested with the power to open and establish, by compulsory acquisition or by purchase, such streets as its council may judge expedient or necessary." Dill. on Mun. Corp., § 467. See, also, People *v.* Smith, 21 N. Y. 595; Wilson *v.* Marsh Co., 2 Pet. 251; Bloodgood *v.* Railroad Co., 18 Wend. 9; West River Bridge Co. *v.* Dix, 6 How. 507; Mercer *v.* Railroad Co., 36 Pa. St. 99; Scudder *v.* Trenton, etc., Falls Co., Saxt. (N. J.) 694; Swan *v.* Williams, 2 Mich. 427; Embury *v.* Conner, 3 Comst. 511; Alexander *v.* Baltimore, 5 Gill, 383; Sedgw. on Const. Law, 517; Curry *v.* Mt. Sterling, 15 Ill. 320; West *v.* Blake, 4 Blackf. (Ind.) 234; Stevens *v.* Middlesex Canal, 12 Mass. 466; Boston Mill Dam *v.* Newman, 12 Pick. 464; Gilmer *v.* Lime Paint, 18 Cal. 229; Armington *v.* Barnet, 15 Vt. 750; White Riv. Turnp. Co. *v.* Central R., 21 id. 590; Bradley *v.* New York & N. H. R. Co., 21 Conn. 294; Olmstead *v.* Camp, 33 id. 532; Eaton *v.* Boston C. & M. R. Co., 51 N. H. 504.

[1] Beekman *v.* Saratoga, etc., R. Co., 3 Paige, 73; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; Railroad Co. *v.* Kip, 46 id. 546; *In re* Fowler, 53 id. 60; Kramer *v.* C. & P. R. Co., 5 Ohio St. 146.

[2] People *v.* Smith, 21 N. Y. 595.

And, with the legislative determination in this respect, the judiciary department of the government cannot interfere. Whether the contemplated project, be it a matter of individual or of corporate action, is of sufficient public interest to authorize the conferring of the right to exercise the power of eminent domain, is for the legislature alone, and with the exercise of its discretion the judiciary of the state has no right to interfere.[1]

But if attempts are made under the authority granted to take property under the claim of right of eminent domain, when in fact it is not warranted by the circumstances of the case, or the appropriation would not subserve public purposes or be of public utility, the courts have power to interfere.[2]

If, however, the use for which it is taken has been declared by the legislature to be of public utility, the courts will hold it to be such, unless the contrary clearly appears.[3]

SEC. 441. **What are public uses which justify the exercise of the right.** — There is a class of pursuits, purposes and enterprises, usually the object of private corporate undertakings, that are generally, if not universally, conceded to be of such public use and utility as to authorize the grant of the right of eminent domain to such persons or associations as undertake to carry them out. Thus, it is held that the building or construction of turnpike and plank roads, canals, railroads, aqueducts, sewers, waterworks, telegraph lines and gas works, are of public use and advantage, and that in reference to these various objects, as well as many others, the public have such an interest, although projected and undertaken by private associations or corporations, as to authorize the conferring upon such bodies the power to exercise the right of eminent domain; and under this power to condemn private property of any kind that may be required to accomplish the object.[4]

[1] Tidewater Co. *v.* Coster, 3 C. E. Green, 518; S. C., id. 55; 2 Kent's Com. 340; Sedgw. on Const. Law, pp. 511, 514.

[2] Talbot *v.* Hudson, 16 Gray, 417; Water Works Co. *v.* Burkhart, 41 Ind. 364; Scudder *v.* Trenton D.F. Co., Saxt. (N.J.) 694; Cottrill *v.* Myrick, 3 Fairf. 222; Concord R. Co. *v.* Greely, 17 N. H. 47; People *v.* Salem, 20 Mich. 452; Bankhead *v.* Brown, 25 Ia. 540; Spear *v.* Blairsville, 50 Pa. St. 150; Sadler *v.* Langham, 34 Ala. 311. See, also, *post*, § 442.

[3] Bankhead *v.* Brown, 25 Ia. 540; Olmstead *v.* Camp, 33 Conn. 551; Tyler *v.* Beacher, 44 Vt. 648; Loughbridge *v.* Harris, 42 Ga. 500.

[4] Id. See, also, Cooley on Const. Lim. 524 *et seq.* and notes; *In re* New York & H.R.R.Co. *v.* Kip, 46 N.Y. 546; Buffalo, etc., R. Co. *v.* Brainard, 9 id. 100; Ol-

On the other hand, there is a class of private enterprises, in relation to which the public benefit to be derived from their prosecution is not so manifest.

cott *v.* Supervisors, 16 Wall. 678; Bonaparte *v.* C. & A. R. Co., Bald. 205; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Davis *v.* Tuscumbia, etc., R. Co., 4 S. & P. 421; Brown *v.* Beatty, 34 Miss. 227; Swan *v.* Williams, 2 Mich. 427; Weir *v.* St. Paul R. Co., 18 Minn. 155; Harvey *v.* Thomas, 10 Watts, 65; New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; San Francisco A. & S. R. Co. *v.* Caldwell, 31 Cal. 367; Gibson *v.* Mason, 5 Nev. 283.

See, also, Bloomfield Gas Co. *v.* Richardson, 63 Barb. 437, where the question of public use in relation to a gas for illuminating a city is considered, and the power to confer the right of eminent domain upon a corporation organized for the manufacture of gas for such a purpose is discussed; and where it is held that the legislature is authorized to confer the right in such cases.

Mr. Pomeroy, in his published brief in said case, furnishes a classification of the different kinds of uses which have been held to be of sufficient public utility to authorize the grant of the right of eminent domain. He groups them as follows:

"1. All purely governmental purposes, whether carried on by the state itself through some of its departments or by local governments such as those of counties and towns. Under this class are public school-houses (Williams *v.* School District, 33 Vt. 271; forts (Gilmer *v.* Lime Paint, 19 Cal. 229), and this class would undoubtedly include buildings for state-houses, capitols, court-houses, public prisons and the like.

"2. All means and methods for the transit of passengers or goods, whether constructed by the state or by private enterprise. This class includes public highways, turnpikes, bridges, railroads, canals, docks and wharves.

"3. Measures of police, and especially those designed to promote health. In this class there are several particular instances not resembling each other in their outward and physical features, but it will be seen that in all of them the element which makes the use 'public' belongs to that branch of governmental functions termed 'police,' and in most of them this element is purely sanitary.

"This class includes: 1. Water works to supply cities with water. Health (the necessity of pure and wholesome water, as much as pure and wholesome air, are not mere conveniences, and emphatically not gain) is the public use which renders these works and enterprises valid. Reddall *v.* Bryan, 14 Md. 444; Burden *v.* Stein, 27 Ala. 104; Lumbard *v.* Stearns, 4 Cush. 60; Mayor, etc., *v.* Bailey, 2 Denio, 452; per Gardiner, President. 2. Provision and means for draining swamps, marshes and low lands. Hartwell *v.* Armstrong, 19 Barb. 166; People *v.* Nearing, 27 N. Y. 306; Anderson *v.* Kerns Draining Co., 14 Ind. 199, 202. This last case expressly holds that draining for sanitary purposes is a public use, but for other purposes is not. 3. Provisions and means for removing dams and permitting stagnant and offensive waters to flow off, thus abating a great public nuisance and rendering a whole district salubrious which was before pestilential. Miller *v.* Craig, 3 Stockt. 175; Talbot *v.* Hudson, 16 Gray, 417; Dingley *v.* Boston, 100 Mass. 544. 4. Drains and sewers in cities. Hildreth *v.* Lowell, 11 Gray, 345. 5. Public burying grounds. Edwards *v.* Stonington Cemetery Assoc., 20 Conn. 466. The cases generally, that is throughout the United Sates, go no further than the foregoing; but,

"4. In Massachusetts, Connecticut, and perhaps in a very few other states, statutes have existed from a very early day known as the 'flowage acts,' by which land is permitted to be taken for mill dams, etc. These statutes form part of the peculiar local systems of those states, and have been sustained on the ground that the means of promoting manufacture was a public use. See Hazen *v.* Essex Co., 12 Cush. 475; Boston Mill Dam Co. *v.* Newman, 12 Pick. 467, and many other Massachusetts cases; Olmstead

Thus, in the case of companies or private corporations, organized for manufacturing purposes, the right to authorize them to take private property, necessary or convenient for carrying out their purposes, has been a question on which the authorities are divided.[1] On this subject Mr. COOLEY observes: "Saw-mills, grist-mills, and various other manufactories, are certainly a public necessity; and while the country is new and capital not easily attainable for their erection, it sometimes seems to be essential that the government should offer large inducements to parties who will supply this necessity. Before steam came into use, water was almost the sole reliance for motive power; and, as reservoirs were generally necessary for this purpose, it would sometimes happen that the owner of a valuable mill site was unable to render it available, because the owners of lands which must be flowed to obtain a reservoir would neither consent to the construction of a dam, nor sell their lands except at extravagant and inadmissible prices. The legislatures in some of the states have taken the matter in hand, and have surmounted the difficulty, some by authorizing the land to be appropriated, and at other times permitting the erection of the dam, but requiring the mill owner to pay annually to the proprietor of the land the

v. Camp, 33 Conn. 532; Todd *v.* Austin, 34 id. 78.

"In the latter case the necessities of the position and the logic of the judge force him to hold that 'whenever a person carries on any business, and furnishes articles which members of the community find it convenient or advantageous to buy, then his business is a public use.' This is the *reductio ad absurdum*. It is saying that the legislature may empower a person to take private property to carry on every trade or occupation conceivable. It utterly abolishes the word 'public' from the constitutional provisions. These doctrines have not been followed to any extent in other states. In Alabama a similar statute was recently declared void, although it had stood for a long time. Sadler *v.* Langham, 34 Ala. 311.

"In Tennessee a very early case had held that a grist mill was a public use, but that a saw mill or a paper mill was not. Harding *v.* Goodlett, 3 Yerg. 41. And even the former part of this decision was recently overruled in Memphis Freight Co. *v.* Memphis, 4 Cold. 419. Finally this New England doctrine has been expressly repudiated in New York. Hay *v.* Cohoes Co., 3 Barb. 42.

"The object, to be a public use, must either be, first, something which *ipso facto*, by its mere existence and of necessity, produces some great common good to all the inhabitants of a particular district, such as sanitary measures for draining, water supply and the like; or, second, it must be something in which the public at large — that is, every individual, if he please — has a legal interest or right such as a highway, railroad, and the like; or, third, it must be something directly governmental, such as a fort, state-house and the like."

[1] Great Falls Man. Co. *v.* Ferald, 47 N. H. 444; French *v.* Braintree Man. Co., 23 Pick. 220.

damages caused by the flowing, to be assessed in some impartial mode. The reasons of such statutes have been growing weaker, with the introduction of steam power and the progress of improvement, but their validity has repeatedly been recognized in some of the states, and probably the same courts would continue still to recognize it, notwithstanding the public necessity may no longer appear to demand such laws."[1] And he further observes

[1] Cooley on Const. Lim. 534. See, also, Angell on Water-Courses, ch. 12; Wolcott Woolen Man. Co. v. Upham, 5 Pick. 294; SHAW, J., in French v. Braintree Man. Co., 23 id. 220.

In Hay v. Cohoes Co., 3 Barb. 47, HAND, J., observed: "The legislature of New York, it is believed, has never exercised the right of eminent domain in favor of mills of any kind; sites for steam engines, hotels, churches, and other public conveniences, might as well be taken by the exercise of this extraordinary power."

But in the case of Hazen v. Essex Company, 12 Cush. 477, which was an action to recover damages sustained by the raising of a dam across the Merrimac river, whereby a stream emptying into that river above said dam was set back, and land overflowed, and a mill on said latter stream was damaged and destroyed, and in which the defendants claimed that they were justified in so doing by virtue of an act of the legislature of Massachusetts, authorizing such appropriation and use of the rights and privileges of the plaintiff, and that the remedy of the plaintiff was a claim of damages under said act, and not by action at common law for the wrongful encroachment upon and injury to the plaintiff's rights in the premises, Chief Justice SHAW observed as follows: "It is contended that if this act was intended to authorize the defendants' company to take the mill power of the plaintiff, it was void because it was not taken for public use, and is not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it, we must look to the declared purpose of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use. The declared purposes are to improve the navigation of the Merrimac river, and to create a large mill power for mechanical and manufacturing purposes.

"In general, whether a particular structure, as a bridge, or a lock, or a canal, or road, is for the public use, is for the legislature, and which may be presumed to have been correctly decided by them. Commonwealth v. Breed, 4 Pick. 463. That the improvement of the navigation of a river is done for the public use has been too frequently decided and acted upon to require authorities. And so to create a wholly artificial navigation by canals. The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially as manufacturing has come to be one of the great industrial pursuits of the Commonwealth, and in our judgment rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain." See Stat. Mass., 1825, ch. 148; Boston and Roxbury Mill. Dam. Co. v. Newman, 12 Pick. 467; Hazen v. Essex Co., 12 Cush. 477; Harding v. Goodlett, 3 Yerg. 41; Newcomb v. Smith, 1 Chand. (Wis.) 71. See, also, Olmstead v. Camp, 33 Conn. 532; Jordan v. Woodward, 40 Me. 317; Miller v. Frost, 14 Minn. 365; Burgess v. Clark, 13 Ired. 109; McAfee's Heirs v. Kennedy, 1 Litt. 92; Smith v. Connelly, 1 T. B. Mour. 58; Shackleford v. Coffey, 4 J. J. Marsh. 40; Crenshaw v. State Riv. Co., 6 Rand. 245; Great Falls Man. Co. v. Fernald, 47 N. H. 444; Ash v. Cummings, 50 id. 591. But see contrary doctrine in Loughbridge v. Harris, 42 Ga. 500; Newell v. Smith, 15 Wis. 101; Fisher v. Horicon Co., 10 id. 351.

that "it is quite possible that in any state, in which this question would be entirely a new one, and where it would not be embarrassed by long acquiescence, or by either judicial or legislative precedents, it might be held that these laws are not sound in principle, and that there is no such necessity, and, consequently, no such imperative reasons of public policy, as would be essential to support an exercise of the right of eminent domain."[1]

But the question, whether the objects and purposes of a private corporation are of sufficient public use to warrant the exercise of the right of eminent domain, is frequently a difficult one to determine. It is generally held, that it may be granted to private corporations for the manufacture of illuminating gas for cities, or those organized for the supply of such cities with water, on the ground of the general public benefit and the sanitary advantages thereby afforded.

So, also, there seems to be no controversy as to the exercise of this right, by railroad corporations, under authority conferred by the legislature in order to enable them to accomplish the objects of their institution, on the ground that they are of public use. But, where is the distinction to be drawn between such corporations and those organized for manufacturing purposes? Take, for instance, those created to manufacture flour, or lumber. They are usually of public benefit like gas and water-works companies, to the inhabitants of the locality where the business is carried on. Where shall the line be drawn, and who shall draw it? What is the distinction, resting upon principle, between the public use and utility of corporations for the manufacture of gas in our cities, and corporations, in the city or country, organized for the grinding of the produce of the country for the general benefit in various ways of the people, at least, in the vicinity where such business is carried on? If, in the former case, the use of land may be required for the erection of the necessary buildings and machinery and for the laying of pipes, so in the latter case, the same necessity may exist for the use of lands to carry on the business. If there is any difference, it would seem to be one of degree and not in principle. And under all the perplexing difficulties which surround the exercise of this right in the various cases where it

[1] Cooley on Const. Lim. 536.

may be claimed or conferred, it would appear the most judicious and practicable to allow the legislature to determine in its discretion those cases where it is proper to confer the power to exercise it, and unless there is a manifest abuse of the discretion, to allow no interference on the part of the courts with such discretion.

That grist-mills are of public use and interest, and, therefore, subject to legislative control in relation to the tolls which may be taken by the proprietors of the same, is perhaps a generally recognized doctrine of the courts. And statutory provisions, relating to tolls, are quite common in the various states.[1] And in Alabama it has been held, that lands might under proper legislative regulations be taken for grist-mills, which grind for tolls, under the right of eminent domain.[2]

SEC. 442. **Who to determine the question of public use.**— Chancellor WALWORTH, on this subject, makes the following observations: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to authorize an interference with the private rights of individuals for that purpose."[3] And Mr. Dillon, on this subject, observes: "As the legislature is the sole judge of the necessity which requires or renders expedient the exercise of the power of eminent domain, without the owner's consent, so it is the exclusive judge of the amount of land or the estate in land which the public end to be subserved requires shall be taken. But as the right originates in necessity, so it is limited by it."[4]

From the foregoing it would appear the appropriate if not exclusive function of the legislature to determine the question of

[1] For a discussion of the subject in relation to the right to regulate the charges of even a private business, which is of general public interest, see *ante*, ch. 3, § 39, and notes. As to the right of parties in Iowa, desiring to utilize water power, for the purpose of propelling any mill or machinery, and of proceeding to exercise the right of eminent domain, and to determine the amount of damages in such cases, see, Code of Iowa (1873), ch. 10.

[2] Sadler *v.* Langham, 34 Ala. 311. But see a contrary doctrine in Loughbridge *v.* Harris, 42 Ga. 500; Tyler *v.* Beacher, 44 Vt. 648.

[3] Beekman *v.* Saratoga and Sch. R. Co., 3 Paige, 73. See, also, Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 251; Cooley on Const. Lim. 532; 2 Kent's Com. 340.

[4] Dill on Corp., § 456.

the necessity or expediency of exercising the right in favor of any enterprise, or of conferring, in a general way, authority upon corporations, to exercise the right, and that its determination is conclusive upon the question, as it is one of a political, and not judicial character.[1]

But whether the appropriation sought by the person or corporation in a particular case, under the statutes providing for the exercise of the right, and whether the use in such a case is one of sufficient public interest, and required for corporate purposes, is ordinarily a question to be determined by the courts.[2]

[1] People *v.* Smith, 21 N. Y. 597; Giesy *v.* Railroad Co., 4 Ohio St. 308; Varick *v.* Smith, 5 Paige, 137.

[2] The legislature must determine in the first instance whether the general objects and purposes of a corporation warrant the grant of the power to exercise the right of eminent domain on the part of the corporation. But, in relation to the particular circumstances under which the exercise of the general power is claimed, the courts may properly determine the justice and sufficiency of the claim. 2 Kent's Com. 340. But if the legislature determine in a particular case that property may be taken, this is, at least, ordinarily, final. Varick *v.* Smith, 5 Paige, 137; Armington *v.* Barnet, 15 Vt. 745.

Mr. Dillon, on this subject, observes: "But the question whether the specified use is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of private property, is perhaps ultimately a judicial one, and if so the courts cannot be absolutely concluded by the action or opinion of the legislative department. But if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking is plainly without reasonable foundation. But if the use is public, or if it be so doubtful that the courts cannot pronounce it not to be such as to justify the compulsory taking of private property, the decision of the legislature embodied in the enactment giving the power that a necessity exists to take the property, is final and conclusive." Dill. on Mun. Corp., § 465; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137.

See, also, Commonwealth *v.* Breed, 4 Pick. 463; Bankhead *v.* Brown, 25 Ia. 540; Hanson *v.* Vernon, 27 id. 28; Concord Railroad *v.* Greely, 17 N. H. 47; 2 Kent's Com. 340; Memphis Freight Co. *v.* Memphis, 4 Cold. (Tenn.) 419; Taylor *v.* Porter, 4 Hill, 142; Cooley on Const. Lim. 530 *et seq.;* Hazen *v.* Essex Co., 12 Cush. 477, where SHAW, J., said: "It is contended that if this act was intended to authorize the defendant company to take the mill-power and mill of the plaintiff it was void because it was not taken for public use, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it we must look to the declared purpose of the act, and if a public use is declared it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote the public use."

See, also, Talbot *v.* Hudson, 16 Gray, 417.

On this complicated question it is further observed by Mr. Dillon as follows: "The citizen is more secure in his rights where the ultimate decision respecting the use or right to take is left to the deliberate, unimpassioned and conservative judgment of the courts; but if the power of eminent domain rests alone upon the basis of the public necessities or of public policy, it seems somewhat difficult to maintain that the legislative determination of this question is not conclusive." Dill. on Corp., § 465, note 3.

SEC. 443. **Limit of the right.** — That the sovereign power to exercise the right of eminent domain is universally recognized, we have already noticed. But this right is limited to the actual necessities of the case, and no more property or rights can be thereby acquired than is essential to accomplish the purposes intended.[1] And where the circumstances only require the partial use of land, as a limited quantity of soil, or stone, or other materials, such quantity may be taken. But a railroad or other corporation cannot acquire, by virtue of statutes conferring this right, an interest in lands, soil, stone or other material, for the purpose of speculation, or any other object than that of the execution of the enterprise or business for which it was created.[2] Nor can the right, as a general rule, be exercised, except to promote objects that are useful, as contra-distinguished from such as are merely ornamental.[3] The line, however, between such cases may be indefinite and difficult to determine, for it is sometimes the case that those objects which are really ornamental may also include those which are useful. And so, *vice versa*, those which are strictly useful, may also include those which are ornamental. On this subject Mr. Dillon observes: "It has been said, since public necessity is the basis of the right of eminent domain, that the right cannot be exercised except where the purpose is useful, and, therefore, that property cannot be compulsorily acquired against the owner's consent when wanted merely for ornamental purposes." [4]

[1] Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39; Hill *v.* Western Vermont R. Co., 32, id. 68; Rensselaer & Saratoga R. Co. *v.* Davis, 43 N. Y. 137; Lance's Appeal, 55 Pa. St. 16; Oregon Cascade Co. *v.* Baily, 3 Or. 164; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Miami Coal Co. *v.* Wigton, 19 id. 560; Union Bridge Co. *v.* Troy, etc., R. Co., 7 Lans. 240; Dill. on Mun. Corp., § 456.

[2] Aldrich *v.* Drury, 8 R. I. 554; Blake *v.* Rich, 34 N. H. 282; Chapin *v.* Sulivan R. Co., 39 id. 564; Henry *v.* Dubuque & Pac. R. Co., 2 Ia. 288.

[3] Woodstock *v.* Gallup, 28 Vt. 587; S. C., 29 id. 347; West River Bridge Co. *v.* Dix, 6 How. 545.

In the case last cited, WOODBURY, J., after a learned consideration of the subject, says: "When we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without the power of eminent domain, and in places where it would only be convenient but not necessary, I entertain strong doubts of its applicability."

See, also, Boston Mill Co. *v.* Newman, 12 Pick. 476; Cooley on Const. Lim. 531 *et seq.*; Bankhead *v.* Brown, 25 Ia. 540; Eldridge *v.* Smith, 34 Vt. 484.

[4] Dill. on Mun. Corp., § 464; citing Angell on Highways, § 85; Smith's Com. on Stat. and Const. Law, § 335. See, also, Memphis Freight Co. *v.* Memphis, 4 Coldw. (Tenn.) 419.

But the whole fee may be taken. *Post*, § 445, and notes.

In New York, under the general railroad act, the corporation has a large discretion in reference to the measure of its wants. *In re* N. Y. Central, etc., *v.* Metropolitan Gas-light Co., 63 N. Y. 326.

If only a portion of another's premises are required for public use, this will not justify taking the whole; but if, under the claim of eminent domain, premises are taken and compensation provided for the taking, and the owner accepts the compensation without objection, he will not be permitted to say afterward that more was taken than was required for the public's use. And he would be estopped from reclaiming the premises thus taken, as his assent thereto would be presumed.[1] Although sufficient land may be taken, by virtue of this right, that is not only absolutely necessary for the accomplishment of the object, and also such as will be incidentally convenient, but, if only part of a lot is required for the purpose, a whole lot cannot be appropriated, even though compensation be made therefor. Thus, in New York, where a statute provided that, whenever a part of a lot was required for a street in a city, the whole lot might be valued, and that after its valuation and compensation made as provided by law, the title should vest in the city, which might appropriate the same to a public use, or sell the same, it was held by the supreme court of that state that such appropriation was not justified by any principles which relate to the right of eminent domain.[2]

[1] Embury v. Conner, 3 N. Y. 511.

[2] Matter of Albany street, 11 Wend. 151.

In this case SAVAGE, C. J., refers to the provision of the statute under which the claim to take the property was based, and observes: "If this provision was intended merely to give the corporation capacity to take property under such circumstances with the consent of the owner, and then to dispose of the same, there can be no objection to it; but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot when only a part is required for public use, and the residue to be applied to private use, it assumes a power which with all respect the legislature did not possess. The constitution, by authorizing the appropriation of property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another. It is in violation of natural right; and if it is not in violation of the letter of the constitution, it is of its spirit and cannot be supported. This power has been supposed to be convenient when the greater part of a lot is taken, and only a small part left, not required for public use, and that small part of little value in the hands of the owner. In such case the corporation has been supposed best qualified to take and dispose of such parcels, or goers, as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received a deliberate sanction of this court. Suppose a case where only a few feet, or even inches, are wanted from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot, would the power be conceded to exist to take the whole lot, whether the owner consented or not? The quan-

SEC. 444. **Who is to determine, as to the extent, amount or quantity of land or other property that may be taken.** — It has already been said that the legislature may, by general laws, provide that corporations or other persons may take lands or other private property, for the execution of their private purposes, provided they are of public interest and benefit; and that it is the appropriate function of the legislature, as the representative in this respect of the state and of the public interests, to determine, generally, the question as to the public use of any private enterprise; and that, unless there is a manifest and flagrant abuse of the discretion of the legislature in this respect, the courts will not interfere with it. But the question may arise, as we have seen, as to the right as well as the extent of the right of condemnation, in particular cases.

The legislature may provide by general statutes for the condemnation, and allow private corporations to take such property, to carry out the purposes for which they were organized, provided they are also of public use, of which it is the principal if not the sole judge, provided they render compensation therefor. But who shall determine what quantity or amount of property or interests may be taken under such general laws, for the purpose of carrying out corporate objects?

Under the general laws referred to, corporations may proceed to take private property by having the same appraised as provided by the statute and on the payment of the value thereof. But where is the limit to the property which may be taken? And who shall determine the amount or extent of the same? And what is the nature and extent of the interest acqured by such corporations?[1]

tity of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature to dispose of private property, whether feet or acres are the subject of this assumed power."

[1] In Beekman v. Saratoga, etc., R. Co., 3 Paige, 45, it was held that it rested in the sound discretion of the legislature to determine whether the benefit to the public would be of sufficient public importance to render it expedient for them to exercise the right of eminent domain.

In this case, Chancellor WALWORTH observed: "There is no doubt that it was competent for the legislature to authorize the company to agree with the owners of land through which the road was to run for a conveyance or donation of the lands neccessary for that purpose; and it would be both inequitable and unjust for an individual who had consented to give the site of the road, provided it should run through his land, to retract that

SEC. 445. Under these general statutes, the title in fee simple is not, perhaps, generally transferred to, or vested in, the corporation, by its express provisions; but the general principles applicable to the measure of damages for the taking, contemplate a valu-

consent after the company had, in reference to such agreement, contracted with the owners of other lands on that particular route. And if such consent was not in fact retracted before the directors of the company had made their certificate of location, so as to preclude themselves from laying out the road elsewhere, it would be the duty of this court to compel a specific performance of the verbal agreement made with them before that time. I infer, however, from the affidavits in this case, that the complainant altered his mind, and retracted his consent to the location of the road on his premises at any place west of the barn, before the second of September, when the certificate of location was signed by the directors.

"The Constitution of the United States does not come in question in this cause. It is admitted that the complainant held the land in fee; and probably under a title derived from the crown, to the rights of which the people have now succeeded. A law declaring the grant from the crown void, and divesting his title on that ground, would impair the obligation of the contract. But it was no part of the contract between the crown and its grantees or their assigns, that the property should not be taken for public use, upon paying a fair compensation therefor, whenever the public interest or necessities required that it should be so taken. All separate interests of individuals in property are held of the government under this tacit agreement or implied reservation. Notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest or even the expediency, of the state is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement. The only restriction upon this power, in cases where the public or the inhabitants of any particular section of the state have an interest in the contemplated improvement as citizens merely, is that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law. The right of *eminent domain* does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. And if the legislature should attempt thus to transfer the property of one individual to another, where there could be no pretense of benefit to the public by such exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual, or to those under whom he claimed title, and repugnant to the constitution of the United States. But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose. (2 Kent's Com. 340.) It is upon this principle that the legislatures of several of the states have authorized the condemnation of the lands of individuals for mill-sites, where from the nature of the country such mill-sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private

ation of the entire interest. And it is probable, at least, that the interest or estate vested in the corporation, by virtue of the statutes, is the whole estate for any purpose required by the corporation in carrying out the objects of its creation, subject, however, in most cases, to a reversion to the original owner, or his heirs or assigns, in case such corporation shall cease to use or occupy such property for corporate purposes.[1]

property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise. And according to the opinion of Chief Justice MARSHALL, in the case of Willson *v.* The Black Bird Creek Marsh Company (2 Peters, 251), measures calculated to produce such benefits to the public, though effected through the medium of a private incorporation, are undoubtedly within the powers reserved to the states, provided they do not come in collision with those of the general government. It is objected, however, that a railroad differs from other public improvements, and particularly from turnpikes and canals, because travelers cannot use it with their own carriages, and farmers cannot transport their produce in their own vehicles; that the company in this case are under no obligation to accommodate the public with transportation; and that they are unlimited in the amount of tolls which they are authorized to take. If the making of a railroad will enable the traveler to go from one place to another without the expense of a carriage and horses, he derives a greater benefit from the improvement than if he was compelled to travel with his own conveyance over a turnpike road at the same expense. And if a mode of conveyance has been discovered by which the farmer can procure his produce to be transported to market at half the expense which it would cost him to carry it there with his own wagon and horses, there is no reason why the public should not enjoy the benefit of the discovery. And if any individual is so unreasonable as to refuse to have the railroad made through his lands for a fair compensation, the legislature may lawfully appropriate a portion of his property for this public benefit, or may authorize an individual or corporation thus to appropriate it, upon paying a just compensation to the owner of the land for the damage sustained. The objection that the corporation is under no legal obligation to transport produce or passengers upon this road, and at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may also from time to time regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road."

[1] See 1 Redf. on Rail., § 69; Connecticut, etc., R. Co. *v.* Holton, 32 Vt. 43. The provisions of the general statutes of the various states, giving the power to exercise the right of eminent domain, are perhaps quite similar; and the

In Massachusetts the supreme court of that state in one case say: "The right acquired by the corporation, although technically an easement, yet requires for its enjoyment a use of the land per-

rights acquired thereby, as well as the extent of the same, would be similar under the various statutes.

The Code of Iowa on this subject provides:

"§ 1241. Any railroad corporation organized in this state may take and hold, under the provisions of this chapter, so much real estate as may be necessary for the location, construction, and convenient use of its railway, and may also take, remove, and use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other materials, on or from the land so taken; and the land so taken otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment, or depositing waste earth.

"§ 1242. It may also take and hold additional real estate at its water stations, for the purpose of constructing dams and forming reservoirs of water to supply its engines. Such real estate shall, if the owner requests it, be set apart in a square or rectangular shape, including all the overflowed land, by the commissioners, as hereinafter provided; but the owner of the land shall not be deprived of access to the water or the use thereof in common with the company on his own land. And the dwelling-house, outhouse, orchards, and gardens of any person shall not be overflowed or otherwise injuriously affected by any proceeding under this section.

"§ 1243. Any such railway corporation may lay down pipes through any land adjoining the track of the railway, not a greater distance than three-fourths of a mile therefrom, unless by consent of the owners of the land through which the pipes may pass beyond that distance, and maintain and repair such pipes, and thereby conduct water for the supply of its engines from any running stream, and shall, without unnecessary delay, after laying down or repairing such pipes, cover the same so as to restore the surface of the land through which the same may pass to its natural grade, and shall, as soon as practicable, replace any fence that it may be necessary to open in laying down or repairing such pipes, and the owner of the land, through which the same may be laid, shall have a right to use the land through which such pipes pass in any manner so as not to interfere therewith; said pipes shall not be laid to any spring, nor be used so as injuriously to withdraw the water from any farm; provided, that such corporation shall be liable to the owner of any such lands for any damages occasioned by laying down, regulating, keeping open, or repairing such pipes, such damages to be recoverable from time to time as they may accrue in any ordinary action in any court of competent jurisdiction. Other provisions of the statute point out the mode in which the compensation to the owner must be ascertained, and for an appeal from the determination of the commissioners, selected by the sheriff for that purpose. The report of the commissioners, where not appealed from, and the amount of damages assessed is deposited with the sheriff, may be filed with and recorded in the office of the recorder of deeds in the county where the lands are situate, and such record is presumptive evidence of title in the corporation to the property so taken, and is constructive notice of the rights of the corporation therein." Iowa Code (1873), § 1253.

Mr. Redfield thinks it very questionable, whether a railroad company in such cases is entitled to the herbage growing upon the land, or to cultivate the same, or dig for stone or minerals in the land beyond what is necessary for their purposes in construction. Redf. on Rail., § 69. And the express provision of the English statute on this subject is to the same effect. 8 and 9 Vict., c. 20, § 17. See, also, Baker *v.* Johnson, 2 Hill. 342; Preston *v.* Dubuque, etc., R. Co., 11 Ia. 15. But see Chicago, etc., R. Co. *v.* Patchin, 16 Ill. 198.

In Evans *v.* Haefner, 29 Mo. 141, it was held that earth and minerals above

manent in its nature and practically exclusive."[1] And in another case, in reference to the rights of railroad corporations, SHAW, C. J., observes: "The railroad company are authorized to do all acts

grade might be used by the company, but that those below belonged to the owner.

In Hill v. Western Vermont Railway Company, 32 Vt. 68, the facts were as follows: The Western Vermont Railway Company, before their road was laid out or surveyed, procured a bond from B. to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road and requisite accommodations. The survey of the road, made by order of the directors, designated certain land belonging to B. as depot grounds, and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff, having recovered a judgment against the company, levied his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land embraced in the levy was never necessary to the company for railroad purposes, and would not become so prospectively. It was held that by B.'s contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations; that under their charter the company could not compulsorily acquire any more land, or any greater estate therein, for the purposes of a road-bed or stations than was really requisite for such uses; that the estate so requisite was not one in fee simple, but merely an easement, and was, therefore, not subject to be levied upon by the creditors of the company; that when taken for such purposes the rule was the same, whether the land was taken compulsorily by condemnation and the award of commissioners, as to its extent and price, or under the agreement of the parties as to one or both of these particulars; that under their charter the directors had power to lay out their road and stations as they saw fit, and that so long as they acted in good faith, and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive.

REDFIELD, C. J., said: "This is an action of ejectment to recover possession of certain lands which the defendants purchased of one Burton for depot purposes about one of their stations, and which the referee in this case has found were not necessary for the present or prospective use of the company for that purpose, the excess, according to the opinion of the referee, being some acres. The plaintiff, being a creditor of the company, levied upon this excess, together with a considerable number of acres more, which the referee finds are necessary for the use of the company, for the purposes for which they were procured. The appraisal and levy was upon the entire portion of land, both that which was and that which was not necessary for the uses of the company.

"The company, before they surveyed their road, contracted with Burton for the conveyance of 'such lands' owned by him 'as shall be required' for the company's road, 'on reasonable request.' The land was subsequently designated by metes and bounds, and the money paid for the piece, but the land has never been conveyed to the company.

"The first question arising in the case is as to the extent of estate which Burton is bound to convey to the company. The plaintiff claims that this is an estate in fee simple, as the contract binds him to convey such lands 'owned by him' as shall be required by the company. This is, no doubt, the fair and natural construction of such a contract between ordinary par-

[1] Hazen v. Boston, etc., R. Co., 2 Gray, 574.

within five rods, which by law constitute their limits in taking away or leaving gravel, trees, stones, or other objects, which in their judgment may be necessary and proper to the grading and level-

ties. If the land is to be conveyed and is defined as land 'owned' by the obligor, nothing less could be fairly intended in ordinary cases than an estate in fee simple. But here the land is purchased and to be conveyed to the company for their use, 'such as shall be required by them.' We do not understand by this all the lands they might ask for, but such as their powers and functions and business required. We do not think the scope of the bond could fairly be made to extend beyond this. It would be very unreasonable, as it seems to us, to construe this bond as extending beyond this, and including, at the election of the defendants, all the land owned by Burton and lying near the line of the railway.

"So, too, it seems to us, that as Burton, by the fair construction of the bond, was only bound to convey such lands as were reasonably required for the legitimate uses of the company, so he was only bound to convey such estate therein as they required for those uses. If the extent of territory could fairly be defined and limited by the general objects and purposes of the contract, which is a familiar rule of construing all contracts, and as applied to a case of this character, a most significant and unquestionable one, as we think, the same rule also applies with equal force to the estate to be conveyed. A contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a particular use, must, of necessity, carry the implication of such limitation upon the estate to be conveyed.

"We think, therefore, that the bond, as originally given, would not have bound the party to convey more land than the company fairly required for their legitimate uses under their charter, or any greater estate in the land than such uses justly required. That is just what the company were empowered to take compulsorily. And their charter, as we think, was not intended to give them power to acquire any more land or any greater estate in such land, for the purposes of a road-bed or stations, than was really requisite for such uses under their charter. We do not intend to say that, if they purchased and took the conveyance of the fee of land for these purposes, they could not hold it or convey it, although some courts have so held. Nor do we intend to intimate any decided opinion that they may do this. The general provisions of the charter of this company are much like other charters in this and the other states, and similar to the general railway act, and seem to have reference to acquiring the right to such an estate in the necessary lands as is requisite for the road-bed and other incidental use and accommodation of the company, in their prescribed and necessary business.

"The company may purchase lands for wood and timber, for their ordinary uses, and may, no doubt, purchase, take, and hold, and also convey the fee simple of such lands. We are not inclined here to question the right of this company to take the fee of lands by way of gift, or in payment of debts due them, either by voluntary conveyance or by levy, *in invitum*. It is not important to discuss these propositions here. They may all be conceded.

"But they do not affect the question, what extent of land and what estate the company were expected to take by purchase or gift, or by condemnation, for their road-bed and depots. We think it very obvious, from this charter and many others we have examined, where the quantity of estate is not defined, that it should be construed as we have already intimated in regard to the bond of Burton, according to the object and purport of the grant, and the necessities or wants of the corporation thereby created. It seems to us to be leaving all just limits of construction to go beyond this. It is certain, as already intimated, that this is the ordinary rule of construing contracts. And statutes are generally construed much after the same rules as contracts, and especially statutes of this character, which are much in the nature

ing of the road, in adjusting and adapting it to other roads, bridges, buildings, and the like, so as to render it most conducive to the public uses which the railway is intended to accomplish.

of contracts between the sovereignty and the shareholders, or, strickly speaking, between the sovereignty and the corporation. In other words, the charter is a grant of certain franchises and immunities, upon certain terms and conditions, and with certain specified or implied limitations. These conditions and limitations are the consideration and the counterpart, so to speak, of the grant. By accepting the grant the corporation bind themselves to perform the obligations and duties reasonably and fairly implied by the conditions of the grant, so that the charter should receive the same construction as any other contract of a similar character.

"One of the important franchises of railway corporations, and the one which distinguishes corporations of this public character from ordinary business corporations, on account of its sovereign or prerogative character, is that right which in the sovereign is called eminent domain, which is the power to invade private property and appropriate it to its own purposes. The right to exercise this function is made dependent upon rendering an equivalent in money, and the implied compact not to acquire more land than they need. And the charters or general laws, in most of the American states, allow the details of the appropriation of lands to the use of railways to be arranged either by the judgment of certain public functionaries designated for that purpose, or by the consent of the land-owner. But in the latter mode even the proceeding is, in some sense, compulsory. The land-owner does not stand precisely in the position of an ordinary proprietor in the market. He has no election whether he will part with his land or not, but only whether he will fix the terms by negotiation or by the appraisal of the commissioners or the court. In either mode of appropriating land for the purposes of the company, where they have by their charter the power to take it compulsorily, there is this implied limitation upon the power that the company will take only so much land or estate therein as is necessary for their public purposes. It does not seem to us to make much difference in regard to either the quantity or the estate, whether the price is fixed by the commissioners or by the parties. For under this charter it is the act of the directors which designates the extent of land to be taken, and thus far the taking is compulsory and strictly under the powers granted by the charter.

"In regard to the mode of appropriating land to the purposes of the road-bed and depots of a railway company, it is obvious that it should be done in some way which shall be judicial and final, for the time at least. This is necessary both for the company and the land-owner, and when done in the mode pointed out in the charter, it must be final, or should be so, unless some power is reserved, either expressly or impliedly, to change the location of the road, as in the defendants' charter seems to be given, or to enlarge its facilities with the advancement of business, which this charter does not give in terms. This is not ordinarily reserved to railways. When once located, the location is commonly regarded as final. They must take such lands as will be likely to accommodate their business, both present and prospective. In doing this it would not be wonderful if they should take more, sometimes, than every one regarded as necessary. The same may be true of their road-bed. A jury or referee might well consider, in many cases, no doubt, that at many points four or five rods, or even three rods in width, was just as beneficial for all the purposes of the road as six rods, which some of the early chartered roads in this state are allowed to take and do take. The same may be often true of the land taken for depot accommodations.

"But if the road-bed or land for stations is taken in the mode prescribed in the charter and general law of the state, whether by the judgment of the commissioners, as to its extent as well as the land damages, or by the act of

Whatever acts, therefore, are requisite to the safety of passengers on the railway, to the agents, servants, and persons employed by the company, and to the safe passage of travelers on and across highways and roads connected with it, and which can be done within the five rods, the company have a right, under their act of incorporation, to do. This is embraced in the idea of taking land for public use."[1]

But it may be affirmed that the current of decisions in this

the directors through their surveyors and engineers, as to its extent, and the appraisal of the commissioners as to its value, or by the directors as to its extent, or the agreement of parties as to the price, as in this case, when once taken in the mode prescribed in the charter, as this land was taken, it is regarded as well settled that the land so taken is not subject to the levy of an execution. This is put upon the ground, and justly, we think, that the estate, being a mere easement for a particular use, is not of the quality and character which by the statute is made subject to a levy. This is not an estate in fee, or for life, or years, or indefinitely, or an equity of redemption, which are the estates defined in the statute. But it is an easement, a right to use the land in a particular mode for a particular purpose, and which cannot be transferred to an ordinary person having no right to use it in that mode or for that purpose, since the estate would cease and the land revert the moment it was put to any other use than the one designated in the charter or statute by or under which the appropriation was made.

"So that whether the company take more or less, if taken for these purposes and no other, and only an easement is acquired by the company, it is not an estate which can be transferred by a levy to the creditors of the company, or by any conveyance, in parcels, probably. But of this we need not speak. It is certain the statute has not provided for levying upon any such estate. And this, we think, is the only estate for which the company contracted with Burton, or which he is bound to convey to them.

"And as to the quantity of land taken, if the directors of the company have power to lay out their own road in any place they choose, and to the extent of five rods in width, and to take such lands for depot purposes as they deem expedient, and they have acted in good faith, we do not see very well how their proceedings can be brought in question by any one. It may have been the folly of the legislature to grant any such power to the directors of the company, but if they have done so, and this power is altogether unlimited, unless they act rashly or in bad faith, it is not very obvious how they are to be controlled in the matter. No doubt if they act recklessly or extravagantly, so as to indicate either utter incompetence, or corruption, or undue influence, or bad faith, a court of equity, at the suit of the landowner or the stockholders, would set the matter right. But this would thus be done in such a mode as to settle it definitely and not to leave it subject to the confusion consequent upon subjecting it to the action of independent tribunals, in regard to portions of the land taken for the same purpose, whose decisions would almost inevitably produce more or less confusion and uncertainty. But so long as the land is appropriated to the road-bed and depot purposes in the very mode prescribed in the statute, we do not very well comprehend how it can be appropriated in parcels to the payment of the debts of the company, by means of levies, even if the fee had been conveyed to the company."

[1] Brainard *v.* Clapp, 10 Cush. 6. See, also, Chicago, etc., R. Co. *v.* Patchin, 16 Ill. 198.

country as well as in England, in regard to the title acquired by the exercise of the right of eminent domain, is that the former owner retains the title, subject to the proper use of the corporation for the purposes for which it was authorized to be taken, and that the owner may still maintain an action of trespass for any use or injury of the freehold, not authorized by the proper use or exercise of corporate powers or any injury to the freehold by a stranger.[1]

It is a matter in fact, which is usually the subject of statutory regulation, and the question depends to some extent upon the construction of the courts of such local statutes. The rights acquired by corporations under such statutes must depend upon such local construction. But it would appear reasonable that, where under such provisions the corporations are required to pay the full value of the property taken for corporate purposes, they should be vested with the whole interest subject to reversion in case of abandonment as before stated.[2]

[1] Dovaston *v.* Payne, 2 H. Bl. 527; 2 Roll. Abr. 566, p. 1; Rust *v.* Low, 6 Mass. 90; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 151; Redf. on Rail., § 69, and notes. But see Nicoll *v.* New York & Erie R. Co., 12 Barb. 460, where a more extended doctrine of the rights of railroad corporations on this question is held, viz.: "Corporations have a fee simple for purposes of alienation, but they have only a determinable fee for purposes of enjoyment."

[2] In Blake *v.* Rich, 34 N. H. 285, it is held that a railway takes but a mere easement in lands. FOWLER, J., says: "Does the railroad corporation acquire any such higher, more extensive and more exclusive right?" (than the public and the public authorities gain by the laying out of such lands as a public highway.) "A careful examination of the various statutes authorizing the taking of lands for railroads, and a comparison of the language with that of those statutes providing for the taking of land for highways, satisfies us it does not, and we see nothing in the use to which the land is appropriated in the one case, and the other requiring the same phraseology to be differently construed in the two cases. By the theory as well as the letter of the law the taking in both cases is for the public use, and that use is no more inconsistent with the continuance of the fee in the original owner in the case of a railroad than in that of a highway." But in Railroad Company *v.* Davis, 2 Dev. & Bat. 467, RUFFIN, C. J., says: "The doctrine of the common law is, that the public has only an easement in the land over which a road passes, and that the right of soil is undisturbed thereby. The reason is, that ordinarily the interest of the public requires no more. Every beneficial use is included in the easement, in respect at least to such highways as existed at the time the principle was adopted, and to which it had reference. But if the use requisite to the public be such a one as requires the whole thing, the same principle which gives to the public the right to any use gives the right to the entire use, upon paying adequate compensation for the whole. It is for the legislature to judge in cases in which it *may* be for the public interest to have the use of private property, whether in fact the public good requires the property, and to what extent. From the great cost of this road (a railway), from its nature and supposed utility, it seems to be contemplated to preserve it perpetually, or for a great and indefinite period. All persons are excluded from going on it, unless in the vehicles provided by the public or its agents; and

SEC. 446. **Where the corporation takes more lands than is required.**— Under various statutes providing for the mode of proceeding to secure the lands of others for corporate purposes, under the right of eminent domain, it is evident that the corporation may claim the condemnation of more land than is required for the corporate purpose, and if allowed to proceed unrestrained and an appraisement is made, the value paid and the proper papers in the case recorded as provided by the statutes,[1] the corporation would thereby secure a *prima facie* right to all the lands thus appraised. What then would be the remedy where the claim was for more land than

to enforce that provision and adequately protect the erections from injuries, it may be requisite to divest the property out of individuals." See, also, Giesy *v.* Cincinnati, Wilm. & Z. Railway, 4 Ohio, (N. S.) 308.

In Nicoll *v.* The New York & Erie Railway, 12 N. Y. 128, it was objected that because by the act of incorporation there was given to the defendant only a term of existence of fifty years, therefore the grant of land in question, which was a piece six rods in width across the grantor's farm for the site of the defendants' railway, should be deemed to have conveyed an estate for years, not in fee. But the court said that the unsoundness of that position was easily shown; that it was never yet held that a grant in fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. And "it is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation, by which its full value may at once be realized."

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. (5 Denio, 389; 2 Preston on Estates, 50.) KENT says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee, for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs, but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. (2 Kent, 282; 5 Denio, 389; 1 Comst. 509.) Large sums of money are accordingly expended by railroad companies in erecting extensive station-houses and depots, and by banking corporations in erecting banking-houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence."

But the right of a railway company to the exclusive possession of the land, taken for the purposes of their road, differs very essentially from that of the public in the land taken for a common highway. The railway compaay must, from the very nature of their operations, for the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy, by the former owners in any mode and for any purpose. Jackson *v.* R. & B. R. R., 25 Vt. 150; Conn. & Pass. Rivers R. R. *v.* Holton, 32 Vt. 47.

THOMAS, J., says, in Hazen *v.* Boston & M. R. R., 2 Gray, 580: "The right acquired by the corporation" (a railway company) "though technically an easement, yet requires for its enjoyment a use of the land, permanent in its nature, and practically exclusive."

[1] See Code of Iowa, *supra*.

is required? The corporation, as we have seen, would only be entitled to take so much as is necessary to accomplish the contemplated purpose.[1] And if, under color of the powers conferred upon them for this purpose, a corporation attempts to take more than is required, it could undoubtedly be restrained by injunction, and the question as to the proper extent or amount be determined in court.[2]

The remedy by injunction in such a case would be the most effectual of any, and the modern practice would enable the complainant to have the extent of the rights of the corporation in the land claimed, determined in the same proceedings. "It has become a well-settled head of equity, that any company authorized by the legislature to take compulsorily the land of another for a definite purpose, will, if attempting to take it for any other object, be restrained by the injunction of a court of chancery from so doing."[3]

[1] Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39; Hill *v.* Western Vt. R. Co., 32 id. 68; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; Lance's Appeal, 55 Pa. St. 16.

[2] See *ante*, § 444, n. 3.

[3] Green's Brice's Ultra Vires, 285; citing L. R., 1 H. L. 43; Crossman *v.* Bristol, etc., R. Co., 1 H. & M. 531. "This principle," observes Mr. Brice, "is with the qualification mentioned below strictly enforced. Whatever be the purposes for which special powers and authorities are given to the attainment of these purposes alone can they be devoted, no deviation therefrom being permitted, however slight and however much the corporation would thereby be benefited." Green's Brice's Ultra Vires, 286. He further says: "In Bentinck *v.* Norfolk Estuary Company (8 De G. M. & G. 714; 26 L. J. Ch. 404; Webb *v.* Manchester, etc., R. Co., 4 N. Y. Sup. Ct. 116; Cothier *v.* Midland R. Co., 17 L. J. Ch. 235; Flower *v.* London, etc., R. Co., 34 id. 540; Edinburgh, etc., R. Co. *v.* Campbell, 9 L. T. [N. S.] H. L. 157. See Eversfield *v.* Mid-Sussex, etc., R. Co., 3 D. G. & J. 286; 28 L. J. Ch. 107), the defendants had power to make and maintain certain cuts and works with authority to take and use such of certain lands 'as might be necessary or proper for them to enter for the purpose of executing these works.' Within the limits of their line of deviation they proceeded to take lands for the purpose not of forming works, but of digging materials for the same. It was held by PAGE-WOOD, V. C, that they had no authority to do so; and this judgment, on appeal, was affirmed, and, therefore, an injunction granted by the vice-chancellor against them was made perpetual. * * * There have been many subsequent decisions on this subject; the latest is that of Lord Carrington *v.* Wycombe Railway Company (L. R., 2 Eq. 825; L. R., 3 Ch. 377; Beauchamp *v.* Great Western Railway Company, id. 745). The defendant's company gave to land-owners notice to treat in respect to a close of land containing 1 acre 27 perches, part of the C. estate. The price was settled between the parties, and the land conveyed to the company by a deed not in the statutory form, including the mines and all the estate of the vendors. The company used about three perches of the land for their railway; and about two years after their purchase they, in pursuance of a contract which, before the notice to treat, they had made with Mr. Terry to convey to him all such part of the C. estate as lay between his land and the railway, conveyed the remaining 1 acre 24 perches

Other modes may be adopted to secure parties from the wrong referred to. But it is not properly within the scope of this treatise to consider very fully the subject of remedies by or against corporations.

SEC. 447. **Compensation.** — The authority to take land for public purposes under the right of eminent domain can only be conferred by the legislature in this country, or by parliament in Great Britain, and this right can only be exercised on making full compensation for the land or other property taken. The constitution of the United States inhibits the taking of private property for public use without just compensation,[1] which would render any authority the states might attempt to confer, for the taking of private property under the right of eminent domain without just compensation, null and void. And the powers of parliament in this respect are equally limited.[2]

to him by a deed, which recited that it was superfluous land. The land was situate within the limits of a borough, but was at some distance from the mass of houses forming the town. There were two cottages upon it. The lords justices held, that apart from other considerations the vendors would have been entitled to relief on the ground that the company had taken the land, not for the purposes of their act, but in order to enable them to fulfill their contract with Terry. Lord Justice CAIRNS, in his judgment, said: 'There is no controversy as to the facts; and it appears to me that a more distinct and more openly avowed case of the use of parliamentary powers for purposes not intended by parliament never has been presented to the court; and this is exactly one of those cases which were described by Lord CRANWORTH in Galloway v. Mayor and Commonalty of London (L. R., 1 H. L. 34, 42), where his lordship said: 'The principle is this, that when persons embarking in great undertakings for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object.' The land here, in my opinion, was taken and is avowed to have been taken for that which was an object entirely collateral, namely, to give to Mr. Terry that which he had bargained for as part of the consideration for the sale of the £20,000 stock." Green's Brice's Ultra Vires, pp. 286–289.

[1] Amendment to the Const. U. S., art. 5.

[2] The Queen v. The Eastern Counties Railway, 2 Q. B. 347; 2 Rail. C. 736.

On this subject of the power in the sovereignty to exercise the right of eminent domain and the necessity of compensation in such cases, to the parties whose property is taken, Mr. Redfield observes: "It seems to have been accurately defined, and distinctly recognized, in the Roman Empire, in the days of Augustus, and his immediate successors, although from considerations of policy and personal influence and esteem, they did not always choose to exercise the right to demolish the dwellings of the inhabitants, either in the construction of public roads or aqueducts or ornamental columns but to purchase the right of way."

"But in the states of Europe and in the written constitution of the United

The constitutions of most, if not all, of the various states contain similar provisions. The duty of making compensation in such cases seems to be in accordance with reason and principles of natural justice; and is recognized in the jurisprudence of all civilized people. On this subject Mr. Redfield observes:

"The duty to make compensation for property, taken for public use, is regarded by the most enlightened jurists as founded in the fundamental principles of natural right and justice, and as lying at the basis of all wise and just government, independent of all written constitutions or positive law." [1]

SEC. 448. The mode of proceeding to determine the amount of compensation is also usually, if not universally, provided for by statute; and where it is thus provided for it is treated as not only directory but exclusive of any other mode; and no rights can be obtained by the proceedings to condemn property for the public use, unless the provisions of the statute are complied with in this and all other respects.[2]

States, and in those of most of the American states an express limitation of the exercise of the right makes it depend upon compensation to the owner. But this provision in the United States constitution is intended only as a limitation upon the exercise of that power by the government of the United States." 1 Redf. on Rail., § 63.

[1] 1 Redf. on Rail., § 65; citing Gillinwater v. The Miss. & A. R. Co., 13 Ill. 1; Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100; Atlantic, etc., R. Co. v. Sullivant, 5 Ohio (N. S.), 276.

[2] As to the compensation for lands taken, and the right to enter, for the purposes of a survey, see Bloodgood v. Mohawk, etc., R. Co., 18 Wend. 9; Cushman v. Smith, 34 Me. 247.

In the former case Chancellor WALWORTH observes: "Another very important question which arises in this case is, whether the legislature in fact authorized the defendants to enter upon the private property of the plaintiff and to construct their railroad thereon before his damages were actually assessed and paid or offered to be paid to him; and if such is the construction of the law, whether such a power is authorized by the constitution. In the case of Rogers v. Bradshaw, 20 Johns. 735, this court decided that where private property was taken for public use it was not necessary that the amount of the compensation should be actually ascertained and paid before such property was appropriated to the public use; that it was sufficient if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay. This decision has been followed by the courts of several of our sister states. To this extent the opinion of Chancellor KENT, in the case of Rogers v. Bradshaw, must be considered as the settled construction of the constitutional provision on this subject, at least in this state. I cannot, however, agree with my learned predecessor in his subsequent reasoning in that case, upon which he afterward acted in the case of Jerome v. Ross, 7 Johns. Ch. 344, that it is not necessary to the validity of a statute authorizing private property to be taken for the public use that a remedy for obtaining compensation by the owner should be

No title can vest under the provisions of statutes authorizing the condemnation of property under the right of eminent domain,

provided. On the contrary, I hold that before the legislature can authorize the agents of the state and others to enter upon and occupy, or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. I do not mean to be understood that the legislature may not authorize a mere entry upon the land of another for the purpose of examination, or of making preliminary surveys, etc., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property if it should afterward be taken for the public use. But it certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the state canal, such a remedy is provided; and if the town, county, or state officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid. In the case under consideration, if this company were authorized to take possession of the plaintiff's property and complete the construction of their road before his damages were assessed and paid, or offered to be paid to him, he might have been wholly without redress, as he has no power to compel the assessment of damages, and no adequate fund was provided for the payment of the damages when ascertained. The citizen whose property is thus taken from him without his consent is not bound to trust to the solvency of an individual, or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts; especially those corporations which are authorized to incur heavy responsibilities in anticipation of the payment of their capital by the subscribers for the stock; and if the true construction of this charter was such as is contended for by the defendants' counsel, I should hold that the provision, which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void.

"I cannot, however, agree with the learned judge who delivered the opinion of the supreme court in this case, that such is the fair and legitimate construction and meaning of the defendants' charter. It is a primary rule in the construction of statutes in those countries where the limits of the legislative power are restricted by the provisions of a written constitution, to endeavor, if possible, to interpret the language of the legislature in such a manner as to make it consistent with the constitution or fundamental law. Applying that principle to the statute under consideration, and having ascertained that it would be inconsistent with the fundamental law of the state to authorize the defendants to take possession of the lands of an individual without having made an adequate and certain provision for the recovery

and providing for compensation, until the provisions of the statute in reference to compensation are complied with.[1] And it may

of the damages which he would necessarily sustain by such permanent occupation of his property for the purposes of the road, there appears to be no difficulty in giving such a construction to this statute as will be consistent with the constitution and also with the probable intention of the legislature. This may be done effectually by considering what is very inartificially appended as a proviso to the seventh section, as in the nature of a *condition precedent*, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the use of the corporation. Indeed, such appears to me to be the more reasonable and fair construction of this section, independent of any constitutional difficulty in the way of a different construction. For, upon the supposition that no injustice was intended by the legislature, it can hardly be presumed they meant to authorize the company to enter upon the lands of individuals, pull down their buildings, etc., and then take their own time to get the damages appraised and to pay the same, leaving the individuals injured thereby to seek for some uncertain remedy by action, if the company neglected to get the damages assessed within a reasonable time.

"The conclusion at which I have arrived, therefore, is that the defendants' plea is imperfect in not averring that the damages had been regularly assessed and paid before the defendants entered upon the plaintiff's land and appropriated it to the use of the road; and that if they in fact entered and commenced the construction of the road before the damages were actually assessed and paid, the plaintiff has a technical right to recover in this action for all damages which he really sustained by such unauthorized entry, although these requisites of the statute were afterward complied with. In that case the defense arising from the subsequent assessment and payment of the damages can only be pleaded to that part of the declaration which charges a continuance of the trespass after the damages were assessed and paid as required by the statute."

In Cushman *v.* Smith, *supra*, SHEPLEY, C. J., observes: "The exclusive occupation of that estate temporarily,

[1] Baltimore & Susquehanna R. Co. *v.* Nesbit, 10 How. 395; Compton *v.* Susquehanna R. Co., 3 Bland. 386; Van Wickle *v.* Railway Co., 2 Green, 162; Stacey *v.* Vermont C. R. Co, 27 Vt. 39; Levering *v.* Railway Co., 8 W. & S. 459; 1 Redf. on Rail., § 65.

In Cushman *v.* Smith, 34 Me. 247, Chief Justice SHAPLEY says:

"There has been a serious difference of opinion respecting the requirements and construction of those constitutional provisions, which declare in the same or similar terms that 'private property shall not be taken for public uses without just compensation.'

"How far legislation may proceed to authorize acts to be done without first making or tendering compensation, and where it becomes arrested by the provision, has been considered by many of the ablest men and most distinguished jurists of the country. And yet there is an indication arising out of the conflict of opinion, and the difficulty of reconciling the positions attempted to be established with each other, and with any sound and pervading principle, that the whole truth has not been reached.

"The more thoroughly it has been examined in connection with legislative enactments, the more clearly has it been perceived that serious difficulties or inconveniences or losses may arise in the rigid and uniform application of any suggested construction to the proceedings required in all classes of public improvements. How can a construction be correct which will allow acts to be done for the purpose of making one kind of public improvement, and prohibit the like acts to be done under like circumstances for the purpose of making another kind of public improvement; which will authorize acts for the purpose of making a public highway, and prohibit

be affirmed, as a general principle, that no right or title to property can be acquired under this right, until compensation for the

as an initiatory proceeding to an acquisition of a title to it, or to an easement in it, cannot amount to a taking of it in that sense. The title of the owner is thereby in no degree extinguished. He can convey that title while thus exclusively occupied as he could have done before. Should he do so by a conveyance containing a covenant that it was free of all incumbrances, that covenant would not make him liable for such an exclusive occupation unless it be admitted that a title to the land or to an easement in it can be acquired without making compensation, and this is denied.

" A construction of the provision which would permit legislation authorizing private property to be exclusively occupied without first making compensation as an incipient proceeding to the acquisition of a title to it, or to an easement in it, and which would not authorize the title of the owner to be extinguished or impaired without compensation, may be somewhat novel, but it will not be found to be unsupported by positions asserted and maintained in judicial opinions. It is generally admitted in them, that examinations and surveys may be authorized by legislative enactments without a violation of the constitutional provision, and without provision for previous compensation. Where is to be found the limit of the legislative power to authorize trespasses of a more extensive and injurious character, which do not extinguish or intrench upon the title of the owner? Does that provision of the constitution permit the legislative power to authorize trespasses not very injurious to private property without providing for previous compensation, and prohibit it from authorizing those of a little more or much more injurious character, which do not in any degree impair or affect the title of the owner? It was not the intention to make the exercise of the legislative power depend upon the extent of the injury, which the authorized acts might occasion, if the title was not invaded.

" There are cases in which an opin-

them for the purpose of making a railway; which will authorize them for the purpose of making a canal or railway, when made by a state, county, city, or town, and prohibit them when the same public improvement is made by a private corporation? And yet such may be the effect of many, if not of most, of the constructions suggested or insisted upon. If, upon principle and sound reasoning, the provision must operate alike upon the construction of all classes of public improvements made by the appropriation of private property to public use, the effect of any proposed construction of the clause may be examined in its practical operation, to ascertain if such could have been the intention of the framers of the constitution.

" If the construction be such as to require payment in all cases for private property so taken before it can be exclusively *occupied* for public use, the result must be that no such improvement can be effectually or beneficially commenced even by a state, county, city, or town, without waiting to have an assessment of damages first made for each person, whose estate is in some degree to be occupied upon the whole line of the contemplated improvement.

" Such a construction would prevent the laying out and making of highways and streets over private estates believed to be benefited and not injured thereby, before there had been an adjudication obtained, that no damages were occasioned; and it would deprive persons thinking themselves aggrieved by such an adjudication or by one estimating the damages to be too little in their judgment, from having such adjudications revised and finally determined by some other tribunal without delaying the progress of the public improvement.

" It is believed to have been the long established course of proceeding, in this part of the country at least, to authorize the exclusive *occupation* of land required for such public uses as the laying out of highways and streets, by making provision by law for compensation to the owner, to be subse-

property taken is made. If proceedings under the statute have been had, and the value of the land assessed, the amount must be

ion is expressed that all injuries to private property authorized by the legislative power can only be authorized by the exercise of the right of eminent domain; and that a temporary injury or occupation amounts to a taking of the property.

"If it be admitted that such an injury or occupation of the property amounts to a taking of it, in the sense in which the word taken is used in the constitution, it will follow that measures must be taken to ascertain the damages occasioned thereby, and that compensation must be actually made before it can be so injured or occupied, or that the right to do it without compensation first made must be admitted, leaving the party injured to the chance of obtaining compensation as he may best be able. If the former alternative be adopted, private property cannot be injured or temporarily occupied, however urgent and immediate may be the public necessity, without waiting for the final completion of all proceedings to ascertain the compensation. And how the amount of compensation can be satisfactorily ascertained before the acts occasioning damages have been performed, it is not easy to perceive.

"If the latter alternative be adopted and the right to cause a temporary occupation or injury be admitted before compensation is made, the party injured must depend upon a legislative provision for his compensation, and the prohibitory clause of the constitution will fail to secure to him, with entire certainty, a compensation. In other words, it will of itself afford him no protection against such temporary injury or occupation, and would leave him in the position in which he would be by a construction of that clause, which would only protect him against a permanent appropriation of his property, or an extinguishment or diminution of his title to it.

"Many of the judicial opinions urgently restrictive of the legislative power assert that the title to land taken or to an easement in it cannot be transferred from the owner to oth-

quently paid, and in many cases authorizing the damages to be finally ascertained as well as paid subsequently. This course of proceeding existed, so far as is known, without complaint, long before the Revolution, which cast off the British dominion; and of course was well known to the framers of the constitution which first contained this prohibitory clause for the protection of private property. Was it the intention to interrupt such course of proceeding and to provide a remedy for a grievance already experienced, or only to prevent private property from being taken from the owner and permanently appropriated to public use without compensation? Constitutional provisions are often and legitimately explained by considering the actual state of facts at the time of their adoption. Thus the provision in the Constitution of the United States for the regulation of commerce is explained to include navigation, by reference to the state of facts existing at the time. By these, or other considerations, many minds appear to have been led to the conclusion that private property might be absolutely taken and permanently appropriated to public use without compensation being first made, when provision was made by law for compensation to be subsequently made from the treasury of the state, or of a county, city, or town.

"Does experience teach that the owner in such cases will always be certain to obtain compensation? History informs us that kingdoms and states have not always paid their just debts in full, that they have often paid them only in promises which would not command gold or silver without a large discount.

"When the private property of citizens residing in a county, city or town, may be taken to pay the debts of the corporation, there may be reason to expect that its debts will be certainly paid. But the law making private property liable to be taken for payment of the debts of such corporations may at any time be repealed or altered; and the corporation in its cor-

paid, or deposited for the use of the owner as provided by law. "The payment or deposit of the money awarded is a condition

ers for public use without compensation actually made, that the acts of payment and of transfer are simultaneous. If this be true, it is immaterial, so far as it respects the acquisition of a title to land, or to an easement in it for public use, when compensation is made. It can only be material to insist that compensation shall be made before an exclusive occupation is permitted, to prevent a temporary inconvenience and loss. An attempt has already been made to show that such was not the design of the prohibitory clause.

"In the case of Callender *v.* Marsh, 1 Pick. 430, the opinion states that the clause 'has ever been confined in judicial application to the case of property actually taken and appropriated by the government.'

"In the case of Hooker *v.* The New Haven and Northampton Co., 14 Conn. 146, WILLIAMS, C. J., says, that the canal being made in the place designated 'and the damages assessed and paid, it became a canal legally authorized, and the company became vested with the legal right to the enjoyment of their property.' And SHERMAN, J. says, 'that the only limitation at common law or by any constitution to the legislative power over individual property is that what is taken must be paid for.'

"In the case of Bradshaw *v.* Rogers, 20 Johns. 103, SPENCER, C. J., says, 'It is true that the fee simple of the land is not vested in the people of the state until the damages are appraised and paid, but the authority to enter is absolute, and does not depend on the appraisal and payment.'

"In the case of Bloodgood *v.* The Mohawk and Hudson Railroad Co.. 18 Wend. 9, Maison, Sen., insists that an entry and possession of the land taken in defiance of the rights of the owner, is a taking of it in the legal sense, and yet he admits that the 'legal fee may not be in them.'

"In the case of Baker *v.* Johnson, 2 Hill, 342, the opinion states, 'Although the absolute fee did not pass to the state until the appraisement of damages, yet the right to enter and use the

porate capacity may not have property from which payment can be obtained.

"Is the distinction attempted to be made between taking private property without first making compensation, when provision is made for payment by a state, county, city or town, and when it is made for payment by a private corporation, a sound one? Can that be a correct construction of the provision which would authorize legislation by which the owner of an estate might be deprived of it without being first paid, whenever in the judgment of some court or tribunal it might be morally certain that he could afterward obtain compensation, and which would not authorize it whenever in the judgment of such court or tribunal it was not so certain that he could obtain it? That would make the title pass from the owner to the public use, not upon payment of compensation, but upon the opinion of certain official persons that a fund or other means had been provided from which he might obtain payment. If such be a correct construction, it would follow that the title to private property may be made to pass from the owner to a private corporation for public use, when that corporation should be found to possess the means or to furnish security which would render it as certain that compensation could be subsequently obtained from it as from the treasury of a state, county, city or town.

"These and other considerations present themselves as serious objections to a construction which would permit an owner of property to be deprived of it without compensation actually paid or tendered to him, whether it be taken for public use by a state, county, city, town or private corporation.

"If such a construction be inadmissible, as well as one which would prevent an exclusive occupation of a temporary character, without payment of compensation, the inquiry is suggested, whether by a correct construction such results may not be avoided.

"This provision of the constitution was evidently not intended to prevent

precedent to the right of the company to enter upon the land for the purposes of construction, and without compliance with it they

property was perfect the moment the appropriation was made.' It is submitted that a payment as well as an appraisement should have been required to pass the title.

"In the case of The People *v.* Hayden, 6 Hill, 359, the opinion states, 'the statute places the right to have compensation made where the principle of the constitution places it, viz., upon the forcible devestment of the use and enjoyment of private property for the public benefit.' If the devestment intended was of a permanent character there would be no objection made to it.

"In the case of Smith *v.* Helmer, 7 Barb. 416, the opinion states, 'It is sufficient for this case that the settled construction of the constitution which prohibits private property to be taken for public use without just compensation, actual compensation need not precede the appropriation.'

"In the case of Rubottom *v.* McClure, 4 Black. 505, it was decided that private property might be taken for public use, upon provision being made for a subsequent compensation.

"In the case of Thompson *v.* Grand Gulf R. R. Co., 3 How. Miss. 240, it was decided that compensation must be first made, the constitution of that state requiring that it shall not be taken 'without a just compensation first made therefor.'

"In the case of Pittsburgh *v.* Scott, 1 Pa. St. 309, it was decided that it was not necessary that compensation should be actually ascertained and paid before private property is appropriated to public use. That it was sufficient that an adequate remedy was provided by which compensation could be obtained without any unreasonable delay. To the construction of the prohibitory clause proposed it may be objected that it will not prevent the exercise of legislative power to authorize the commission of serious injuries upon private property without making provision for compensation.

"A construction so broad as to prevent this would greatly limit the legislative power, and bring it within a

the exercise of legislative power to prescribe the course of proceeding to be pursued to take private property and appropriate it to public use; nor to prevent its exercise to determine the manner in which the value of such property should be ascertained and payment made or tendered The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor.

"The provision was not introduced or intended to prevent legislation authorizing acts to be done which might be more or less injurious to private property not taken for public use. It is not unusual to find that private property has been greatly injured by public improvements when there has been no attempt to take it for public use. The records of judicial proceedings show that private property in railroads, turnpike roads, toll bridges and ferry ways has been often greatly injured, and some times quite destroyed, by acts authorized by legislation, which, according to judicial decisions, did not violate any provision of the constitution.

"Private property is often injured by the construction and grading of highways and railways when no attempt has been made to change its character from private to public property. The cases of Day *v.* Stetson, 8 Greenl. 365; Callender *v.* Marsh, 1 Pick. 418; Canal Appraisers *v.* The People, 17 Wend. 571; and Susquehanna Canal Co. *v.* Wright, 9 Watts & Serg. 9, present examples of it.

"The provision was not designed, and it cannot operate to prevent legislation which should authorize acts operating directly and injuriously, as well as indirectly, upon private property when no attempt is made to appropriate to public use. An instance of this kind of legislative action will be found in the case of the Commonwealth *v.* Tewksbury, 11 Metc. 55, where a person was held indictable for the removal of gravel from his own

may be enjoined by a court of equity, or prosecuted in trespass at law for so doing. The right of the land-owner to the damages

much narrower sphere of action than it was accustomed to claim and exercise without complaint before the constitutions containing this clause were framed. Reliance must be placed upon the justice of legislation, and upon the administration of the laws for a recompense for such injuries, and not upon a provision of the constitution not designed for such a purpose.

"Another objection to this construction may be that the owner will not be able to recover compensation for the exclusive occupation of his land, and for the injuries thereby occasioned, when the proceedings are not so completed and compensation made as to transfer any title to land, or to an easement in it for public use.

"This objection is believed to be founded upon an incorrect position. If compensation be not made within a reasonable time after the land has been exclusively occupied, the right to continue that occupation will become extinct. It being authorized only as a part of the proceedings permitted for the acquisition of title, when it becomes manifest by an unreasonable delay that the avowed purpose is not the real one, or that, if real, it has been abandoned, the measures permitted for that purpose will no longer be authorized, and if the occupation be continued after that time the occupants will be trespassers, and liable to be prosecuted as such. The damages occasioned before the right of exclusive occupation became extinct may be recovered by an action of trespass, or by an action on the case, containing in the declaration averments that an exclusive occupation was authorized for the purpose of acquiring title for public use, and that no such proceedings have taken place as would transfer any title within a reasonable time, with other suitable averments. If the occupants should be regarded as trespassers *ab initio*, it would not be, as has been supposed, because they had omitted to make compensation, but because they had continued to occupy or commit trespasses after it had become manifest

land contrary to a statute provision, which did not assume to appropriate to public use or to make compensation for it.

"The design appears to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others for public use without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, not to protect such property from all injury by the construction of public improvements; not to prevent its temporary possession or use without a destruction of it or a change of its character. It was designed also to prevent the owner of real estate from being deprived of it, or of an easement in it, and to prevent any permanent change of its character and use without compensation. While it was not designed to prevent legislation which might authorize acts upon it which would by the common law be denominated trespasses, including an exclusive possession for a temporary purpose, where there was no attempt to appropriate it to public use. Such acts of legislation might be very unjust, and it may be presumed that no legislative body would make such enactments without making provision for the compensation of injuries to private property occasioned by acts designed to promote the public good.

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"This leads to a further inquiry to ascertain the sense in which the word *taken* was used in the constitution.

"That word is used in a variety of senses, and to communicate ideas quite different. Its sense, as used in a particular case, is to be ascertained by the connection in which it is used, and from the context the whole being applied to the state of facts respecting which it was used.

"It cannot well be denied, and it is generally admitted to have been used in constitutions containing this clause to require compensation to be made for private property appropriated to public use, by the exercise on the part of the government of its superior

awarded is a correlative right to that of the company to the land. If the company has no vested right to the land, the land-owner has none to the price of the land." [1]

that their avowed was not their real purpose, or after their real purpose had been abandoned.

"It is not necessary to decide whether such an action could be maintained, for the distinction between the actions of trespass and case has been abolished in this state.

"After some difference of opinion, it may now be regarded as settled, that enactments which authorize private property to be taken for public use must provide the means or course to be pursued to have compensation made for it.

"The conclusions to which this discussion leads are:

"1. The clause in constitutions which prohibits the taking of private property for public use was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it, or to an easement in it.

"2. It was designed to operate, and it does operate, to prevent the acquisition of any title to land, or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it.

"3. That the right to such temporary occupation as an incipient proceeding will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land, or of an easement in it.

"4. That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation, unless compensation, or a tender of it, be made within a reasonable time after the commencement of such occupation.

"5. That under such circumstances an action of trespass, or an action on the case may be maintained to recover damages for all the injuries occasioned by the prior occupation.

"In this case, as no compensation or tender of it was made to the plaintiff within a reasonable time after his estate was occupied by the corporations, no title to it, or to an easement in it, has been acquired, and the occupation, although legally commenced, has ceased to be legal.

"As the corporation acquired no title to the land, or to any easement in it, the defendant could acquire none by his conveyance from that corporation."

title to all property required by the necessities of the people to promote their common welfare.

"This appears to have been denominated the right of eminent domain, of supereminent domain, of transcendental propriety. These terms are of importance only to disclose the idea presented by them, that the right to appropriate private property to public use rests upon the position that the government or sovereignty claims it by virtue of a title superior to the title of the individual, and that by its exercise the individual and inferior title becomes wholly or in part extinguished — extinguished to the extent to which the superior title is exercised. To take the real estate of an individual for public use is to deprive him of his title to it, or of some part of his title, so that the entire domain over it no longer remains with him. He can no longer convey the entire title and dominion."

[1] Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39. See, also, 1 Redf. on Rail., § 65.

In Stacey *v.* Vermont Cent. R. Co., 27 Vt. 39, it was held that the payment or deposit of the money awarded for damages was a condition precedent to the right to enter upon the land for the purpose of building the railroad and without which the company might be enjoined, or prosecuted for the trespass; and that, if the com-

SEC. 449. **Damages — mode of estimating.** — We have heretofore stated the rule of damages in such cases as follows: "The stat-

pany has no vested right to the land, the owner has none to the damages awarded him.

In this case ISHAM, J., says:

"This action is brought to recover damages which were appraised by commissioners for taking the plaintiff's land for the use and construction of the Vermont Central railroad. The survey of the road was made on the 4th of June, 1847, and was recorded in the town clerk's office, on the 5th of August in the same year.

"The appraisal of damages by the commissioners was made on the 5th of January, 1849, and was recorded on the 6th of February, afterward. No appeal having been taken within ninety days, as limited by the 8th section of the charter, that appraisal has become conclusive as to the amount of damages sustained, and, if the plaintiff is entitled to recover, will prevent any further litigation of that matter.

"It appears from the case also, that in February, 1850, the defendants changed their line of road by locating the same on other land than that of the plaintiff, and upon which their road has been constructed. That alteration of their line of the road has superseded the necessity of taking the plaintiff's land on which the road was first surveyed. The right of the corporation to change the line of their road is given them by the 15th section of their charter, which provides that if the directors of that company, for any cause, shall deem it expedient, they may change the location of such parts of their road as they shall deem proper. That change in the line of their road, however, will operate as an abandonment of their former survey on the plaintiff's land, so that the company can no longer claim any right or interest in the land itself, or to any easement growing out of it, in consequence of that survey having been made. That doctrine has been expressly held in Massachusetts, in relation to highways. Commonwealth *v.* Westborough, 3 Mass. 406, and Same *v.* Cambridge, 7 id. 163, and the same effect, we think, will follow in cases of this character. The result is, that the plaintiff retains his land free from any incumbrance arising from that location or survey of the road. That abandonment of the line of the road over the plaintiff's land, however, does not necessarily supersede his claim for damages. The right to recover those damages, whether liquidated by the agreement of the parties or by commissioners, is not necessarily defeated by that act of the company. If the land has once been taken, if the company, for any period of time, have been seized and possessed of the land so appraised, or if the plaintiff has had, at any time, a perfected right to the damages awarded by the commissioners, a subsequent abandonment of that location, and the establishment of a new line for the road, will have no effect to defeat the plaintiff's claim for the damages which have been awarded to him. Westbrook *v.* North, 2 Greenl. 179; Hampton *v.* Coffin, 4 N. H. 517; Harrington *v.* Com'rs of Berkshire, 22 Pick. 267; Hawkins *v.* Rochester, 1 Wend. 53. Under such circumstances the plaintiff would be entitled, on the abandonment of that location, to the land free from any incumbrance of that character, and also to the damages which were allowed to him.

"The important question in the case therefore arises, whether the Vermont Central Railroad Company have ever been seized or possessed of this land of the plaintiff, and for which the award of the commissioners was made; or has the plaintiff ever had a vested right to the damages which were awarded on that survey of the road? The determination of these questions depends upon the construction which is to be given to the 7th section of the charter of this company. We obviously can derive but little aid on this subject from adjudged cases in other states, unless they have arisen upon some statutory provision, embracing substantially the specific provisions of that section of this charter. By that section it is provided, that when land or other real estate is taken by the corporation for the use of their road, and the parties are unable to agree upon the price of the land, the same shall be ascertained and determined by commissioners, together

utes of the states generally make some provision in reference to damages in such cases, such as that in estimating the same no

with the charges and costs accruing thereon, *and upon the payment of the same, or by depositing the amount in a bank as shall be ordered by the commissioners, the company shall be deemed to be seized and possessed of all such lands as shall have been appraised.* This provision is quite specific in stating what act on the part of the corporation vests in them a right to the land. They derive no title to the land or any easement growing out of it, from the fact of their having surveyed the road across the plaintiff's land, or having placed that survey on record, nor by having the damages appraised by commissioners, and causing their award to be recorded. The statute is express, that the payment or deposit of the money according to the award must be made before any such right accrues. Until that payment is made, the company have no right to enter upon the land to construct the road or exercise any act of ownership over the same. A court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. The survey and appraisal of damages are merely preliminary steps to ascertain the terms upon which the land can be taken for such purposes, if the company shall see fit to use the same for the construction of their road. If it is accepted, and the company conclude to take the land, that acceptance and that taking is consummated only by a payment or deposit of the money, for the use of the owner of the land, as awarded and directed by the commissioners. The case of the Baltimore & Susquehanna R. Co. *v.* Nesbit *et al.*, 10 Howard, 395, is very decisive on this question. In that case land was taken by the company under a charter granted by the State of Maryland. Under a provision in their charter, the damages were assessed by a jury, and that assessment was confirmed by the court. In that case, as in this, the road was located, and the damages conclusively determined and settled, so that no further litigation could arise on that matter. In that case, as in this also, the charter provided, that the payment, or tender of payment of such valuation, should entitle the company to the estate or land as fully as if it had been conveyed. The charter of that company and of this, in all particulars important upon this question, are substantially similar. The court remarked, 'that it is the payment or tender of the value assessed by the inquisition which gives the title to the company, and, consequently, without such payment or tender no title could, by the very terms of the law, have passed to them.' They further observed: 'that it can hardly be questioned, that without acceptance *in the mode prescribed*, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption.' The same doctrine was sustained in the case of Bloodgood *v.* Mohawk & Hud. R. R. Co., 18 Wend. 10, 19. In that case the company were authorized to enter upon the land and make such examinations and surveys as were necessary to determine the most advantageous route for the road, and to take the same for that purpose; provided, that all land so taken shall be purchased by the company of the owner, and in case of a disagreement as to the price or value of the land, commissioners were to be appointed to determine the same, *and upon payment of such damages with the costs, or depositing the same in a bank in the city of Albany, then the corporation shall be deemed to be seized and possessed of the land so appraised.* It will at once be perceived, that the provisions of that charter are not only similar in this respect to that of the Vermont Central Railroad Company, but that they are expressed in very similar language. The Chancellor remarked 'that this provision should be considered in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the

account shall be taken of the benefits conferred by the contemplated improvement for which the land is taken.[1] The gen-

use of the corporation.' It is very clear, from these cases, that as the Vermont Central Railroad Company have never paid or deposited the amount of that award of the commissioners for the benefit of the plaintiff, as ordered by them, that the company have never acquired any right or title to the land appraised, or to any easement growing out of it; and that none can now be acquired under those proceedings. The abandonment of that location, and the adoption of a new route, and the construction of their road thereon, will prevent the acquisition of any such title or the perfection of any such right.

"It is insisted, however, that though the corporation have no right to the land, and have never been seized or possessed of the same, yet that the plaintiff, under the provisions of that act, has acquired a vested right to the damages awarded by the commissioners, and that that right became vested in him when the award was made and recorded. The statute requires 'that the commissioners shall determine the damages which the owner of the land may have sustained, or shall be likely to sustain, by *the occupation of the same for the purposes aforesaid.*' The actual taking and occupation of the same for such purposes is the foundation upon which the binding character of that award is made to rest. It is those circumstances which the commissioners are to take into consideration in ascertaining the amount of damages. If, therefore, the land has never been taken by the company in a manner in which they can legally occupy the same, no damages have arisen, or can arise, from that cause. When the corporation obtains a vested right to the land, or to the easement, the landholder has a vested right to the damages; that specific act, which vests the right in them, gives also a vested right to the owner of the land. These respective rights are correlative, and have a reciprocal relation; the existence of one depends upon the existence of the other. If the corporation have no vested right to the land, the owner of the land has no vested right to the price which was to be paid for it. This is the very ground upon which the cases were sustained to which we were referred in the 2 Greenl. 179; 4 N. H. 517; and 1 Wend. 53. Two of these cases were in assumpsit, and the other in debt for the recovery of a sum awarded for land taken for similar purposes. The land-owner was allowed to recover his damages, and was treated as having a vested right to them, as a vested right to the easement in the land had been acquired, for which those damages had been given as a compensation. That is also the doctrine of the case in 10 How. 395, for on that ground alone was sustained the constitutionality of the act of Maryland, in causing to be vacated the *first appraised*, and ordering a new inquisition to be taken. As there had been no payment or tender of the damages assessed, there was no vested right to the land, and for that reason the act was held constitutional in vacating the first inquisition. On the same ground, and for that reason specifically assigned, the court, in the case of Harrington *v.* Berkshire, 22 Pick. 267, granted a mandamus to enforce the payment of damages awarded to the landholder. The road had been laid, the title to the easement *under their statute had vested*, and for that reason, the party had a vested right to the damages awarded. We know of no case, neither have we been referred to any, in which such damages have been recovered, or in which the owner of the land has been considered as having a vested right to the same, when the corporation had acquired no right to the land, or to an easement growing out of it. There is no propriety or consistency in saying, that the plaintiff shall recover this compensation for land which has never been taken or purchased from him; that this company shall pay for a right or an easement, which they never had, and which they never could legally enjoy. If the line of this road had been so varied as to run over another

[1] Const. Ia., art. 1, § 18.

eral rule is, that the party whose land is taken may recover the market value of the land thus taken, and, in the absence of statutory provisions, no allowance should be made on account of the general advantage which the owner enjoys in common with the

portion of the plaintiff's land, it would hardly be contended that he would be entitled to a double compensation; yet such would be the result if this action can be sustained.

"The cases in England have no definite bearing upon this subject, nor are they in conflict with the construction we have given to the provisions of this charter. In that country, generally, the railroad is located, and its courses definitely defined, when the application is made to parliament for a charter. When a charter is granted, it is based upon that location, and authority is granted to take that specific land for that purpose. The owner of the land is required to specify the sum he demands for it, and if not assented to, inquisition is to be made to determine the value of the land. Burkinshaw *v.* Birmingham & Oxford Railway Co., 4 Eng. Law & Eq. 492. Under those charters it has been held that, if no inquisition is made, the company are bound to pay the sum specified, and not only has payment been enforced by mandamus, but the company have, by the same process, been compelled to carry into effect all the powers delegated to them by their charter. Blakemore *v.* Glamorganshire Canal Navigation, 1 Mylne & Keene, 162, 163; Regina *v.* The Eastern Counties R. Co., 10 Ad. & Ell. 581; Regina *v.* The York North Midland R. Co., 16 Eng. Law & Eq. 299. That doctrine, however, has since been overruled in the Exchequer Chamber, to which the last cited case was carried on a writ of error. York & N. Midland Railway Co. *v.* Regina, 18 Eng. Law & Eq. 206, 207, 208. Those charters are now treated as conferring conditional powers to take the land on making compensation for it. The observations of JERVIS, Ch. J., in the last case, are very appropriate and applicable to the rights of the parties under this charter: 'The company may take land; if they do, they must make full compensation. The words of the statute are permissive, and only impose the duty of making full compensation to each land-holder, as the option of taking the land of each is exercised.' This case as well as the case of Burkinshaw *v.* The Birmingham & Oxford R. Co., 4 Eng. Law & Eq. 489, establishes the correlative and reciprocal relation existing between the right of the company to the land, and the right of the owner of the land to the damages awarded. If the land has been taken in such a manner as to vest in the company a right to the use and occupancy of it, compensation is to be made; but no right to such compensation can exist where the land has not been taken.

"The authorities upon the questions involved in this case, we think, are more than ordinarily clear and decisive, and fully establish the principle that the plaintiff has no claim to these damages, as the land has never been taken or occupied by the corporation for the purposes mentioned in their charter; and that the payment of the money, as awarded by the commissioners, is necessary, and is to be treated as a condition precedent to the right of the company to the land, or to any easement growing out of it."

In Neal *v.* Pittsburgh & Connellsville Railway Company, 31 Pa. St. 19, it is held that, where a railway company had located their road through a man's land, and had the damages assessed by viewers and confirmed by the court, the owner of the land was entitled to execution for the amount as upon a judgment in his favor, although the company had not taken possession, and had instituted proceedings to ascertain the advantages of another route with a view to change the location.

The court say: "Though railroad companies may make experimental surveys at pleasure before finally locating their road, yet certainly it has never been granted to them to have experimental suits at law as a means of chaffering with the land-owner for the cheapest route."

public generally by reason of the public improvement.[1] And where damages are assessed for a railroad, it should include compensation for all actual loss to which the owner will be subject by reason of the proper construction and operation of the road. The proper mode of ascertaining damages for a right of way of a road across lands is to determine the market value of the premises before the right is set apart, and then again immediately after, and the difference will be the true measure of damages. Present values and the immediate and necessary consequence of parting with the right conferred being alone proper to be considered, and future benefits, abuse of privilege and unwillingness of the owner to part with the right should be disregarded. The condition in which the premises will be left after the right of way is taken, together with the damages assessed, should be equal to the value of the premises immediately before the right of way is taken.[2] Present depreciation, and not anticipated injuries, is the measure of damages,[3] although future exposure to fire may be proper to be considered by a jury in estimating them, as it would tend to reduce the present value."[4]

[1] Jacob *v.* City of Louisville, 9 Dana (Ky.), 114; 2 Kent's Com. 339 and notes; Israel *v.* Jewett, 29 Ia. 475; Fleming *v.* The Chicago, etc., R. Co., 34 id. 353.

[2] Watson *v.* The Pittsburgh, etc., R. Co., 37 Pa. St. 469; Schuylkill Nav. Co. *v.* Thoburn, 7 S. & R. 411; Deaton *v.* Polk Co., 9 Ia. 594; Preston *v.* Dubuque, etc., R. Co., 11 id. 15; Henry *v.* Dubuque, etc., R. Co., 2 id. 288; Sater *v.* Burlington, etc., R. Co., 1 id. 386.

[3] Wilmington, etc., R. Co. *v.* Stauffer, 60 Pa. St. 374.

[4] Field on Dam., § 846; citing Colville *v.* Railway, 19 Minn. 283. See, also, Pottstown Gas Co. *v.* Murphy, 39 Pa. St. 257; Hornstein *v.* Atlantic, etc., R. Co., 51 id. 87; Buckwalter *v.* Black-rock Bridge Co., 38 id. 281; Dearborn *v.* The Boston, etc., R. Co., 4 Foster (N. H.), 179; Mt. Washington R. Co.'s Petition, 35 N. H. 134; Minnesota Cent. R. *v.* McNamara, 13 Minn. 508; Winona, etc., R. Co. *v.* Waldron, 11 id. 515; Fleming *v.* Chicago, etc., R. Co., 34 Ia. 553; Deaton *v.* County of Polk, 9 id. 594; East Pennsylvania R. Co. *v.* Hottenstine, 47 Pa. St. 28; Searle *v.* The Lackawanna, etc., R. Co., 33 id. 57; Patten *v.* North Cent. R. Co., id. 426; Dorlan *v.* East Brandywine, etc., R. Co., 46 id. 520; Town of Lambertville *v.* Clevinger, 1 Vroom (N. J.), 53; Amsden *v.* Dubuque, etc., R. Co., 28 Ia. 542; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367; Tingley *v.* City of Providence, 8 R. I. 493, Bangor R. Co. *v.* McComb, 60 Me. 290; Thompson *v.* Grand Gulf R. Co., 3 How. (Miss.) 240; Bonaparte *v.* Camden, etc., R. Co., 1 Bald. (C. C.) 205; Rexford *v.* Knight, 11 N. Y. 308; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9; Baker *v.* Johnson, 2 Hill, 342; People *v.* Hayden, 6 id. 359.

Mr. Redfield observes in reference to the mode of estimating damage as follows: "But this is most readily and fairly ascertained by determining the value of the whole land, without the railway and the portion remaining after the railway is built. The difference is the true compensation to which the party is entitled." 1 Redf. on Rail., § 71. This gives the owner the benefit anticipated from the building of the road, from which others in close proximity to the road may be equally benefited. And the

SEC. 450. **Elements of damages which may be considered.** — In estimating the damages sustained, the appraisers, however selected, or the jury, where it is submitted to a jury, may consider not only the present, but the prospective injury which the party will sustain by a prudent construction and operation of the road. Thus, they may take into account the effect which a proper construction of the road will have in diminishing deposits of sediment on the balance of the land;[1] the deterioration of the balance of the land; the additional risk by fire and care of family and stock, in consequence thereof; the inconvenience of embankments, excavations and other obstructions to the free use of the land or buildings;[2] the increase or decrease in value of the remaining lands, and the additional expense of fencing.[3] But these elements and considerations should be considered as affecting the present damages for the taking of the land; the true rule being, as we have stated it, viz., the difference between the value of the land before and immediately after the appropriation, as affected by the various circumstances which we have indicated. But where the whole land of a party is taken, the measure of damages would be the whole value of the land at the time of the taking, without regard to the anticipated benefits which may result from the construction and operation of the road.[4]

SEC. 451. **Land injuriously affected but not taken.** — It is a generally recognized doctrine of the common law, that railroad corporations are not liable for the incidental damages occurring to premises not taken, under the exercise of the right of eminent domain, provided they exercise proper care in the construction and operation of their roads. Such damage is *damnum absque injuria*, and no action can be maintained therefor.[5] But

right to consider benefits to be derived in common with others has been questioned in many cases, as an element to reduce the amount of compensation for the appropriation of lands, by railroad corporations.

[1] Concord R. Co. *v.* Greely, 3 Fost. 237.

Somerville, etc., R. Co. *v.* Doughty, 2 Zabr. 495.

[3] Greenville, etc., R. Co. *v.* Partlow, 5 Rich. 428.

[4] See notes, *supra;* Little Miami R. Co. *v.* Collett, 6 Ohio (N. S.), 182; Pacific R. Co. *v.* Chrystal, 25 Mo. 544. See, also, in case of woodlands, Ryder *v.* Striker, 63 N. Y. 136. The value should be fixed at the time proceedings are commenced. Graham *v.* Connersville R. Co., 36 Ind. 463; 10 Am. R. 56.

[5] Field on Dam., § 43.

they would be liable for diverting a stream of water from its natural course, whereby a person sustains damage.[1]

[1] Hatch *v.* Vermont Cent. R. Co., and Whitcomb *v.* Same, 25 Vt. 49.

In reference to such cases, REDFIELD, C. J., observed:

"The important question in the case is, how far this railway company is liable for consequential damage to lands near their track, but no part of which is taken, by them, for any purpose. It seems to be conceded in the argument for the plaintiff, and assumed on all hands, that nothing in the company's charter, or in any general statute of the state, in force at the time, in terms made them liable for such damage. Indeed, this assumption seems indispensable to enable the plaintiff to get along with his case. For, if such remedy is given by statute, it is probably exclusive, or at all events it would doubtless often have been resorted to long before this. But no such claim has ever been made, by any one; and this may be regarded as pretty satisfactory proof that no such express provision exists. The English courts seem to consider a provision in the charter for assessing damages, in a summary way, exclusive and not a cumulative remedy. East and West India Docks, etc. *v.* Gattke, 3 Eng. Law & Eq. 59; Watkins *v.* Great Northern Railway, 6 id. 179.

"It must be conceded, then, that so far as a general, unqualified grant of the legislature will enable the defendants to build the road, and continue its operation, without liability for consequential damage to the proprietors of the land, not taken, they are acquit of all such liability. There is no doubt the legislature might have granted the charter with this liability attached to the company, or any other which they saw fit to attach. The accepting of the charter was not imperative upon the company. But having accepted it, they are bound by its conditions, and entitled to all its privileges. And it seems to us fair to assume that no such obligation being imposed upon the company, in the charter, or by the general statutes of the state then in force, it was the purpose of the legislature to exempt them from such obligation, so far as they had the power to do so. The reason for doing this it is scarcely needful to discuss. It was, doubtless, esteemed some object to encourage such companies to build their roads. The extent of such injuries had not been much considered, perhaps, at that time, and almost all our citizens then esteemed a desideratum to bring a railway as near them as possible, the nearer the better. I should not probably be able to give much force to an argument, which is said to influence some minds, that it would be impossible for any company to stand up under such a burden. I should probably think, if such was the statute or the law, that they must stand up under it, or fall before it. And it seems to me, that such a statute regulation, which exists in England, and in Massachusetts, and perhaps in some of the other states, is highly equitable and just. And if these public works cannot be maintained upon fair and just grounds, by individual enterprise, they must be fostered by public grants, or delayed till they can be thus maintained. But if, instead of this, the legislature sees fit to annex no such condition to the charter, and thus virtually, so far as they have the power, exempt them from any such obligation, the company are entitled to have their rights fairly and fully vindicated, in the tribunals of the state, the same as other citizens. Nor should this be done grudgingly, or by compulsion, but justly and equitably, the same as in other cases of like character. If the character of parties should come to be the measure of their rights, and this to be determined by the fallible judgments of imperfect humanity, swayed or seduced by the conceits, the passions, and the prejudices of the moment, men might almost as well resort at once to their ultimate rights, before civil government existed.

"If, then, the legislature have purposely exempted this company from such an obligation, we do not well perceive how the plaintiff will be fairly able to deprive them of the benefit of the exemption, unless he can show that such an exemption is a violation of the constitutional restrictions upon the power of the legisla-

ture, or else that it is exempting a particular person from the general liability, by law attaching to all other persons, similarly situated, and in such case, the exemption would be void, probably, as an act of special legislation, upon general principles of reason and justice, like a particular act, allowing one citizen perpetual exemption from punishment for all offenses, or from all liability for torts.

"Perhaps it may be useful to consider this latter ground first. It should be premised, in the very outset, that it is no fair test of the general liability of a railway company for their acts, to argue from what natural persons may lawfully do, and what, if done by them, becomes a nuisance. There is no doubt, that if an individual, or a mere partnership, should do all that the defendants' company do daily, in the village of Burlington, they would become indictable for the continuance of a common nuisance, and a mere statute of exemption from liability to prosecution for crime would not affect their liability. And any citizen suffering special damage, by means of such nuisance, might have his action, or enjoin the offenders ordinarily, in equity.

"But here the sovereignty of the state have seen fit to confer upon this company an important franchise, a considerable portion of that sovereignty which themselves possess, the right to construct and continue a railway, almost from one extreme of the state to the other, with slight limitations as to its course, and providing no tribunal but their own engineers to determine its location. The location which they adopt, then, is conclusive of their rights to build the road in that place as to every one, unless resisted by some proceeding, taken at the time of the location, and brought to bear directly upon the question of the location of the road. If the plaintiff, or others interested in the location of this road, would insist that it is improperly located, inasmuch as it is in a too populous portion of the village, to allow of such a work, this should have been done, by mandamus, or injunction, or some proper process, to arrest and correct the evil, at the time of its being built. But it is now too late to bring this matter in discussion, perhaps, in any form, or at any time, since the decisions in Lexington and Ohio R. R. *v.* Applegate, 8 Dana, 289, reversing the decision of Chancellor BIBB, Philadelphia and Trenton R. R. Co., 6 Wharton, 25; and many other cases, and especially the discussions in regard to the railways in the city of New York, and the fact that in the largest city upon the continent the efforts of the constituted authorities have hitherto been found almost powerless for the regulation merely of the operation of railways, and locomotive engines, in her principal thoroughfares, and have made no approach toward an exclusion of them even there.

"It will, therefore, scarcely be claimed that the operations of the defendants, in the village of Burlington, are a mere nuisance. There was nothing in the proof tending to show that they were so conducted as to be made such by reason of mismanagement as to the time and manner of carrying on their operations, as seems to have been held in *some* of the New York cases, where the operation of engines, near a church, on Sunday, during the time of public worship, was regarded as actionable, as a common nuisance, causing special damage to this church as a corporation. The First Baptist Church, etc., *v.* Sch. & Troy R. R. Co., 5 Barb. Sup. Ct. 79. But the precise contrary doctrine was held, it seems, in The First Baptist Church, etc., *v.* Utica R. R. etc., 6 Barb. Sup. Ct. 313. And in Drake *v.* Hudson R. R., etc., 7 Barb. Sup. Ct. 508, it was held generally, that a road running through streets in a city does not amount to the infringement of private rights, provided the passage is left free to travel. The owners of property bounded on streets have no exclusive right of property in them. It belongs to the corporation, *the legal owners of the soil*, to manage and regulate the use of the streets. See note to 7th ed. Kent's Com., vol. 2, p. 398, by Kent & Eaton. It is said, in the last case, that for any injury done to the adjoining proprietors they may have an action on the case.

"The question still recurs, what is to be regarded as a legal injury? If the operations of the railway in that place are to be regarded as altogether legal, and the adjoining proprietors have no interest in the soil under the street, as in the case of an ordinary highway in the country, which seems to be the view taken by the court here, then the ordinary carrying forward of the busi-

ness of the railway, although it may cause annoyance and damage to the dwellers along the street, could scarcely be regarded as a legal injury, for which an action will lie. In the language of the law, it is *damnum absque injuria*. If the company constructed their road in an improper manner, thus causing needless damage to the adjoining proprietors, or if they wantonly or negligently run their cars, or carry on their operations, so as in any manner to cause needless damage to such proprietors, they would be entitled to a remedy, by action.

"But, upon general principles, the defendants may conduct their lawful business, in a reasonable and prudent manner, "with as little injury to plaintiff's premises as was consistent,' etc., in the language of the bill of exceptions in this case. It seems to be well-settled law, that the first occupier of land acquires no right (within the period of prescription for presuming a grant) to exclude an adjoining proprietor from the free use of his land, in any proper mode, by erections or excavations. A building, which has stood more than twenty years, is presumed to have a grant to have its walls supported by the adjoining land, and that its ancient lights shall not be darkened. 1 Bac. Abr. 77, citing 22 H. 6, 15; 9 Co. 59; Bland's case, cited Bulstrode, 115; 2 Rolle's Abr. 107, 143; 3 Leon. 93. The same rule is laid down in all the elementary writers, and generally recognized in the English Reports. But, in some of the American states, this doctrine of ancient lights is questioned, or denied. Parker & Edgarton *v.* Foote, 19 Wend. 309. But when no such question arises, the adjoining proprietors may excavate or put up erections to any extent, with impunity, using proper precautions to cause no unnecessary damage. Prior occupancy gives no exclusive rights. Panton *v.* Holland, 17 Johns. 92; Thurston *v.* Hancock, 12 Mass. 220, where the subject is very elaborately discussed and satisfactorily determined. It is here held, that if one, by digging into his own soil, cause the surface of his neighbor's land to slide into the pit, or cause damage to his neighbor's erections, by not using proper and reasonable precautions in making his excavations, for such damage an action will lie, but not for removing his earth in a prudent manner, whereby his neighbor's soil or erections caved and fell, by reason of extraordinary weight, put upon the land."

CHAPTER XVIII.

QUO WARRANTO.

SEC. 452. **The writ of quo warranto at common law.** — The extraordinary remedies by injunction, mandamus, prohibition, quo warranto, etc., may be used by and against corporations, as well as natural persons. But as special treatises are devoted to these subjects we do not deem it necessary fully to consider any of them, except quo warranto, which relates more intimately and exclusively to corporate rights and franchises.

The origin of the original writ of quo warranto is of great antiquity. It was originally a writ of right of the king, issued against one who had usurped an office, or unlawfully claimed and exercised a franchise of the crown, and to inquire by what authority he claimed to hold the office or exercise the right. "It was also granted," observes Mr. High, "as a corrective of the mis-user, or non-user of a franchise, and commanded the respondent to show by what right 'quo warranto' he exercised the franchise, having never had any grant of it, or having forfeited it by neglect or abuse."[1] In this country the writ issues in the name of the government against any person or corporation that usurps

[1] High's Extraordinary Leg. Rem., § 592. See, also, 3 Bl. Com. 262; Commonwealth *v.* Small, 26 Pa. St. 31; State *v.* Ashley, 1 Ark. 279.

any franchise or office, and commands the sheriff or other executive officer to summon the defendant to be and appear before the court, whence the writ issues, at a time and place therein named, to show by what right, quo warranto, he claims the franchise or office mentioned in the writ.[1] But this original writ has now become obsolete, and in lieu thereof there has been substituted an information and writ, in the nature of quo warranto.[2]

This information is, in form, criminal, and is usually instituted by the public prosecutor for the purpose of preventing the usurpation of public offices or franchises, and of correcting their abuses, either of mis-user or non-user. Blackstone observes: "The judgment on a writ of quo warranto (being in the nature of a writ of right), is final and conclusive even against the crown. Which, together with the length of its process, probably occasioned that disuse into which it has now fallen, and introduced a more modern method of prosecution by information filed in the court of King's Bench by the attorney-general in the nature of a writ of quo warranto, wherein the process is speedier and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by fine for the usurpation of the franchise, as to oust him or seize it for the crown, but hath long been applied to the mere civil right of seizing the franchise or ousting the wrongful possessor, the fine being nominal only."[3]

SEC. 453. **Proceedings in the nature of quo warranto.** — In most of the states proceedings are authorized by statute in the nature of quo warranto. The proceeding is authorized for substantially the same purpose, namely: to correct usurpations in office or abuse of corporate franchises. And the term quo warranto is frequently used in constitutions and statutes when proceedings in the nature of quo warranto are meant.

Mr. Justice SPENCER, in relation to this question and the use of the term in the constitution of New York, observes: "An information in the nature of quo warranto is a substitute for that ancient writ which has fallen into disuse, and the information which

[1] See Bouv. Law Dic.

[2] High on Extra Leg. Rem., § 591.

[3] 3 Bl. Com. 263; High on Extra. Leg. Rem., §§ 603–609.

has superseded the old writ is defined to be a criminal method of prosecution, as well to punish the usurper by fine for the usurpation of the franchise, as to oust him, and seize it for the crown. It has for a long time been applied to the mere purpose of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only."[1]

And DIXON, C. J., observes: "Now it was with the view of this well-known jurisdiction, then and long before exercised only in the proceeding by information, that the framers of the constitution gave or reserved the power to this court, using for convenience and brevity merely the words 'writ of quo warranto,' just as those words were used by Chancellor KENT in *Attorney-General* v. *Utica Insurance Company*, 2 Johns. Ch. 371, 376, and as they had been used in our own statute, * * * as meaning the same thing and intended to convey the same general idea of the words 'information in the nature of quo warranto.'"[2]

SEC. 454. **The remedy regulated by constitutional and statutory provisions.** — The constitutions and statutory provisions of the various states, usually fix the courts that are authorized to administer this remedy, and the mode and effect of the remedy in different cases. And usually, the proceeding by quo warranto, as well as by the other extraordinary remedies by injunction and mandamus, is not authorized when the party claiming it has an adequate remedy

[1] Attorney-General *v.* Utica Ins. Co., 15 Johns. 358.

[2] State *v.* West. Wis. R. Co., 34 Wis. 197.

DIXON, C. J., in this case, construing a clause in the constitution of Wisconsin, giving power to the supreme court of that state "to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari," etc., further observes: "It is as impossible to believe that the framers of the constitution were looking back over a period of three or four hundred years, into the middle ages, designing to give this court such jurisdiction and only such as was then exercised in virtue of the writ of quo warranto, as it is that they intended to confine the court to that antiquated and useless process. The framers of the constitution were practical men, and were aiming at practical and useful results. They used the words 'writs of quo warranto,' just as they had been used in common parlance and by courts, lawyers, and writers for hundreds of years, as synonymous with 'information in the nature of quo warranto,' which had so long been the complete and unqualified substitute for the writ." State *v.* West Wisconsin R. Co., 34 Wis. 197.

See, also, State *v.* Gleason, 12 Fla. 190; State *v.* Merry, 3 Mo. 278; State *v.* St. Louis Ins. Co., 8 id. 330; State *v.* Stone, 25 id. 555; Commonwealth *v.* Burrell, 7 Pa. St. 34; Murphy *v.* Farmers' Bank, 20 id. 415; State *v.* Ashley, 1 Ark. 279; S. C., 513; State *v.* Johnson, 26 Ark. 281; High on Ext. Leg. Rem., § 610.

by ordinary proceedings.[1] It can only be used to test the actual right to an office or franchise, and not the legality of the official action of corporate officers.[2] And if the statute provides for this remedy, to test the right to exercise a franchise, it is held to be exclusive of all other remedies for that purpose.[3]

SEC. 455. **As a remedy against private corporations.**—Having considered, briefly, the origin and history of the writ of quo warranto, and the modern substitute for the remedy, by information in the nature of quo warranto, and some of the general principles applicable to the remedy, we will now proceed to discuss the remedy more particularly in its application to private corporations.[4]

From what has already been said, it is evident that a corporate franchise is a special privilege or immunity proceeding from the sovereign power, and conferred by a grant from such power. And it is a doctrine universally recognized, that the sovereignty conferring the franchise may at any time, through the courts it has constituted, inquire into the manner in which the franchise is used. And if the person or association on which the privilege is conferred has been guilty of mis-user or non-user; or if such party has assumed the right of franchise where none exists, the courts may, by the proceedings in the nature of quo warranto, declare a forfeiture, or render a judgment of ouster as the circumstances of the cases require. But it is not every act of nonuser or mis-user that will justify a judgment of forfeiture. In such cases it is held, that these wrongs must, in order to constitute grounds for forfeiture, relate to the essence of the corporate grant, and the contract thereby created between the sovereign and the corporators. But willful and repeated violations of duty in this respect would usually warrant a judgment of forfeiture.[5]

[1] High on Extraordinary Leg. Rem., § 616; People *v.* Hilsdale & C. Turnp. Co., 2 Johns. 190; State *v.* Wadkins, 1 Rich. 42; State *v.* Marlow, 15 Ohio St. 114; State *v.* Taylor, 15 id. 137.

[2] People *v.* Whitcomb, 55 Ill. 172; Dart *v.* Houston, 22 Ga. 506.

[3] Updegraff *v.* Evans, 47 Pa. St. 103; Hullman *v.* Honcomp, 5 Ohio St. 237; High on Extra. Leg. Rem., § 619.

[4] It is held in Arkansas that the ancient writ is the proper remedy to resume a corporate franchise. State *v.* Real Estate Bk., 5 Ark. 595.

[5] Commonwealth *v.* Commercial Bank, 28 Pa. St. 383; People *v.* Kingston & Middletown Turnpike Co., 23 Wend. 193.

In the former case the proceeding was in the nature of quo warranto to

SEC. 456. **The fact of nonuser or misuser must be clear.** — It will occur to every one on the least reflection that in the pursuit of the main objects and purposes of corporations organized for pecuniary gain, mistakes and unintentional errors will naturally

procure a forfeiture of the charter of the bank for misuser, on the ground of its having dealt in promissory notes contrary to the express provisions of its charter, and loaned money at rates of interest not authorized by it. The court, by LEWIS, C. J., say: "These acts are expressly prohibited by the charter. The question then arises, do these constant and willful violations of the fundamental conditions upon which the charter was granted entitle the commonwealth to demand its forfeiture? The question is not whether a single act or even a series of acts of mis-user, through inadvertence or mistake, may work a forfeiture, but whether the constant and willful violation of these important conditions of the grant produces that effect?

"Mr. Justice STORY, in delivering the judgment of the supreme court of the United States in Mumma *v.* Potomac Company, held that 'a corporation, by the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for willful mis-user or non-user.' 8 Peters, 287.

"Many years before that decision was pronounced the same principle was fully recognized by the same high authority in Terrett *et al.* *v.* Taylor *et al.*, 9 Cranch, 43, where the right of forfeiture for mis-user or non-user was held to be 'the common law of the land, and a tacit condition annexed to the creation of every corporation.'

"It is now well settled by numerous authorities that it is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they were incorporated, and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter, or for a condition broken or for a breach of trust. See Ang. & Am. on Corporations, § 776, and the cases there cited.

"In the Attorney-General *v.* Petersburgh & Roanoke R. Co., 6 Iredell, 461, it was held that the omission of an express duty prescribed by charter is a cause of forfeiture, and that, as implied powers are as much protected by the law as those which are expressed, implied duties are equally obligatory with duties expressed, and their breach is visited by the same consequences.

"It may be affirmed as a general principle, that where there has been a mis-user or non-user in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions complained of have been repeated and willful, they constitute just ground of forfeiture."

It is considered a mis-user *per se* at common law to neglect the performance of conditions contained in the charter. But will such neglect always constitute grounds for forfeiture? NELSON, C. J., in considering the above question, in People *v.* Kingston & Middletown Turnpike Co., 23 Wend. 193, observes: "But granting this to be the general principle, the question still comes up for consideration, what departure from the provisions of the charter will work a forfeiture? Shall every omission or non-performance of a condition of the grant have this effect? Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred and the conditions enjoined upon them, they obtain the grant and engage to perform the conditions, and when charged with a breach I do not perceive any reason against holding them accountable upon principles applicable to an individual to whom valuable grants have been made upon conditions precedent or subsequent. As to him, performance is indispensable to the vesting or continued enjoyment. If a feoffment be made of lands upon condition of paying rent, building a house or planting an orchard, and a failure to perform, the feoffer may enter; so, if an office be granted, a con-

occur that may be in violation of the charter or constating instruments, and that not unfrequently the line between such acts as may be authorized and those which are not will be indistinct.

The courts, therefore, especially in proceedings by quo warranto for a forfeiture of the grant on account of mis-user or non-user, exercise great caution and seldom adjudge a forfeiture unless there is a manifest violation of the grant.[1] But where the violation of the charter is clear, and especially if frequently repeated, or where there is an exercise of powers beyond those conferred, as where a corporation authorized to do an insurance business engages in a general banking business, on an information filed against it therefor, in a court of proper jurisdiction, it will render a judgment of forfeiture or ouster against such corporation.[2]

dition is implied that the party shall faithfully execute it, and for neglect the grantor may discharge him. 1 Bacon, 629; 15 Wend. 291; 1 id. 388; 3 id. 498; 13 id. 530.

"Placing corporate grants upon this footing, there can be no great difficulty in ascertaining the principles that should govern conditions annexed to them. The analogous cases of individual conditional grants will give the rule. In these a reasonable and substantial performance according to the intent of the grantor is required. Shep. Touch. 133; 15 Wend. 291.

"In cases of conditions subsequent, if impossible to be performed, or rendered impossible by the act of God, the grantee is excused, and the estate is absolute. 2 Bacon, 676, tit. Condition; Shep. Touch. 133, 157.

"So if waste be committed by a stranger, it shall not be a breach of the condition of the lease. 2 Bacon, 652. The whole law on the subject will be found reasonable, and nothing will be found unreasonable, and nothing is required but what is within the means and ability of the party to comply with. It is emphatically so with respect to corporators, for we all know the nature of the conditions in their characters depends very much upon themselves; they usually settle the terms of the grant, and therein consult their own as well as the public interests.

"I have said that the whole law on the subject of performance of conditions precedent or subsequent is reasonable and within the ability of the company to perform. A substantial performance according to the intent of the charter is all that is required. Under the issues that are presented this will be a question on the trial. If such a performance is shown the defendants will be entitled to a verdict.

"The law in respect to individual grants on condition will afford familiar principles to guide the court and jury. Slight departures are overlooked. The learning of the law is against the party claiming the forfeiture, and if the failure is such as cannot be regarded in a court of law upon settled principles, and has arisen from mistake or accident, the legislature will apply the remedy. They and not the court possess the dispensing power."

[1] High on Extra Leg. Rem., § 649; State *v.* Commercial Bank, 10 Ohio, 535.

[2] People *v.* Utica Ins. Co., 15 Johns. 358.

In a case where an information was filed by the prosecuting officer of the state on its behalf, against the defendants, a railway corporation in the state of New Hampshire, alleging a

SEC. 457. **As a remedy for an unlawful usurpation of an office in a private corporation.** — It has been a disputed question whether an information in the nature of quo warranto was a lawful remedy, in case of an intrusion into an office of a private corporation.

usurpation on the part of the defendants, of the exercise of corporate functions within the state of Vermont in a manner inconsistent with the sovereignty of the state, and claiming process against the state in the nature of quo warranto. It appeared that the defendants, a railroad corporation, having a line of railroad through the state of New Hampshire, to line of the state of Vermont at Wells river, erected a bridge across the Connecticut river, in order to connect with certain Vermont railroads, which connection was authorized by express statutes of that state, and purchased about fifteen acres of land, for the use of the former road, useful in doing business at the line of the state, if they should not unite at the line of the state, and indispensable, if they should thus unite. The question presented was, whether the purchase by, and conveyance to them, of the land in Vermont was a usurpation of sovereign powers of the state. On this question REDFIELD, J., observes:

"By their charter, it is admitted, this corporation have permission to hold real estate, for the accommodation of their business, greatly exceeding what they now hold. The question then is, whether the having purchased and taken a conveyance of this land, in this state, is to be regarded as any usurpation upon the sovereignty of the state? And it seems to us very obvious that they have committed no such usurpation; that they have assumed no franchises which are strictly of a prerogative character. By that I mean, such acts as neither natural or artificial persons can exercise without special grant of the legislature. All the functions of a corporation are, in one sense, franchises. The right to hold property in the corporate name, to sue and be sued in that capacity, to have and use a corporate seal, and by that to contract, and some others, perhaps, are franchises, which constitute the very definition of a corporation. And whenever and wherever the corporation is recognized, for any purpose, the existence and exercise of these franchises must also be recognized. But the right to build and run a railroad, and take tolls, or fares, is a franchise of the prerogative character, which no person can legally exercise, without some special grant of the legislature. And we should not, of course, be expected to suffer a foreign railroad to usurp the exercise of any franchises of this character. This distinction exists in regard to some other classes of corporations. It is only the issuing of notes to be the representative of specie, and to form a portion of the currency, and the other local operations of banking — making discounts and receiving deposits, and the like — which are of a prerogative character. But there are many other franchises of foreign banks, and other business corporations, of which it is of daily occurrence to allow the exercise, in every state in the union. They are allowed to sue and collect their debts, to levy their executions upon land, and take land in payment of debts, when mortgaged, or otherwise. And of all this no doubt is entertained. Mr. Justice MCKINLEY was the only judge who ever had the boldness to hold the contrary, and his decision was speedily reversed by the supreme court. Bank of Augusta *v.* Earle, 13 Pet. 519, 588.

"This point is expressly decided in the state of New Hampshire, in the case of Lumbard *v.* Aldrich, 8 N. H. 31, where it is held that "a corporation, created by the laws of another state, has power to take and hold lands in this state." PARKER, J., says: "If they may sue, they may satisfy their judgment, by levy upon lands; and of course hold the land and convey it. And if they can do this, they may take title by deed, in satisfaction of a debt, by agreement, or upon any other consideration." The same point is decided in The Silver Lake Bank *v.* North, 4 Johns. Ch. 370, and in most of the American States. Our own reports are filled with cases in favor of and against foreign corporations, Day *v.* The Essex County Bank, 13 Vt. 97; Grafton Bank *v.*

But it seems now settled in this country that the court may permit the information to be filed in such cases where the claim is only for the benefit of a private citizen.[1] And as the abuse of the

Doe, 19 id. 463; Claremont Bank v. Wood, 10 id. 582, occur to me at the moment, and there are, doubtless, twenty other cases of the kind. All the chartered bridge companies across Connecticut river are, of course, incorporations, in most cases the charters having been granted by the legislature of New Hampshire; and it was shown to us, in the trial of this cause, that in very few instances has any grant been obtained from this state. But these bridges, like the railroad bridge in question, must rest at their western termini upon the soil of this state. And all this has been acquiesced in for fifty years and more. This will not indeed settle the rights of this railroad corporation by prescription, as their own existence is of a more recent date. But it goes very far, in my apprehension, toward settling the law of the state, in regard to road and bridge corporations in the states conterminous with this state; and especially when corporations have been created in this state, with express permission to unite with this railroad, or any other New Hampshire road at this point, should I regard it as decisive of the right of the New Hampshire corporation to build their road to the very line of the state, if they could obtain the land for that purpose, without coercive measures. They could not, perhaps, compel the land-owners to yield them the right of way, or even space to sustain the western abutment of their bridge, without a grant from the legislature, of the prerogative power to exercise the right of eminent domain over lands in this state.

"But, having obtained the permission of the land-owners, I should not regard the bringing of their road to the very limits of this state, under the circumstances, as any infringement of the sovereignty of the state, or as any exercise of a prerogative franchise. It is the settled law of England, in regard to aliens even, that if they purchase land by royal license, they may hold it. And in the present case, we could scarcely regard the permission given the Vermont roads by their acts of incorporation, or acts amendatory of such acts, to unite with this or any other New Hampshire roads at the line of the state, at this point, as any thing less than an implied permission to the New Hampshire roads to build their superstructure to the very line of the state. And as this line, at this point, is the 'westernmost bank of the Connecticut river,' the bridge must, of course, in order to bring the rails to the line of the state, rest more or less upon Vermont soil. Allowing them then no prerogative right to eminent domain in the soil, we cannot regard the long practice of bridge companies across the Connecticut river, the actual license of the legislature, and the reason of the case, as justifying any interference with their quiet possession of the land, for the purpose of erecting a bridge, by permission of the owners of the fee of the land, or by means of obtaining the fee in themselves." State of Vermont v. Boston, etc., R. Co., 25 Vt. 433.

[1] In Murphy v. Farmers' Bank, 20 Pa. St. 415, WOODWARD, J., observes: "The usurpation of an office established by the constitution, under color of an executive appointment, and the abuse of a public franchise under color of a legislative grant, are public wrongs and not private injuries, and the remedy by quo warranto, in this court at least, must be on the suggestion of the attorney-general or some authorized agent of the commonwealth. * * In questions involving merely the administration of corporate functions, or duties which touch only individual rights, such as the election of officers, admission of a corporate officer or member, and the like, the writ may issue at the suit of the attorney-general, or of any person or persons desiring to prosecute the same. What is a corporation? A franchise. And Blackstone defines a franchise to be a part of the royal prerogative, existing

franchise is a public wrong, it has been held that the proceedings, in the absence of other statutory regulations on the subject, should be instituted in the name of the public prosecutor or other agent authorized by the supreme authority of the state, and that a private citizen is not entitled to the remedy even though he be a creditor of the corporation.[1]

in the hands of the subject. The sovereignty of every state must be lodged somewhere. Limited by such concessions as popular violence has from time to time wrung from reluctant monarchs, it resides, in England, in the crown. In Pennsylvania, it resides in the whole mass of the people, and the three co-ordinate departments of government are the trustees appointed by the people for the exercise of so much of their sovereignty as they have not, by the bill of rights, denied them, nor by the constitution of the United States yielded to the general government. The legislature of Pennsylvania may establish a corporation, that is, grant out a part of the sovereignty of the state, because being a general trustee for the people, and not forbidden, they are qualified to do so. The general government being a government of derivative powers, congress cannot establish a corporation, because the power to do so is not granted. Our legislature can, because the power is not withheld. A corporation then exists in Pennsylvania by virtue of a constitutional exercise of the sovereign power. Its existence is proof of the public will, which is nothing else than the will of the majority. Can one man so employ any of the departments of the government as to tear down the fabric of a majority?

"Regarding the judiciary as one of the trustees of the sovereignty of the people, by which I mean the whole people, how can its functions be called into exercise against the existence of a public institution, except upon the suggestion of some agent of the whole people? If they may, if individual caprice, passion, prejudice, or interest may use the judicial arm of the government to overthrow what the legislative or executive arms have erected, the sovereignty of the majority is extinguished, and the departments of the government intended to work in harmony are brought into fatal conflict. A house divided against itself cannot stand, and no more can a state. If quo warranto be given to individuals to dissolve corporations, power will cease to steal from the many to the few, for here will be a transfer of it bodily. With a corrupt judiciary, which the history of other countries teaches us is not an impossible supposition, acting as the instrument of private passions, any institution established by the immediate representatives of the people, and existing by will and consent of the people, and for their convenience and benefit, may be frustrated without appeal or recourse. These are general views which harmonize with the doctrine of the cases. And, therefore, whilst I recognize the right of any relator to have a quo warranto in the supreme court who is desirous to prosecute the same to redress any private grievance that falls within that remedy, I deny the right of any party except the attorney-general, or other officer of the commonwealth, to sue for it to dissolve a corporation." See, also, High on Extra. Rem., § 653; Commonwealth *v.* Graham, 64 Pa. St. 339; The People *v.* Tibbets, 4 Cow. 358.

[1] State *v.* Paterson & Hamb. Turnp. Co., 1 Zabr. 9; Commonwealth *v.* Farmers' Bank, 2 Grant's Cas. 392; Commonwealth *v.* Philadelphia, etc., R. Co., 20 Pa. St. 518; Same *v.* Alleghany Bridge Co., id. 185; Murphy *v.* Farmers' Bank, id. 415.

And it is said that there is no instance in England where informations have been allowed by leave of court against persons, for usurping a franchise merely private in its nature, and not of a public character. High

And in all cases where he is authorized, a private party must show that he is interested in the matter, before the court will allow him to file an information. But a corporation is regarded as having such interest. Such a party may, however, by his acts, waive his rights or forfeit his claim to the proceeding; as where he, knowing the illegality of an election, participates in proceedings at corporate meetings, and recognizes and acquiesces in the result.[1] The privilege of filing an information, on the part of a private prosecutor, rests in the sound discretion of the court.[2]

on Extra. Leg. Rem., § 653; King *v.* Ogden, 10 B. & C. 230.

See, also, Gaylord *v.* Fort Wayne, etc., R. Co., 6 Biss. 286.

On this subject Chief Justice TILGHMAN, in Commonwealth *v.* Arrison, 15 S. & R. 127, says: "I find no instance of an information in the nature of quo warranto in that country [England], except in a case of a usurpation of the king's prerogative, or of one of his franchises, or where the public, or at least a considerable number of people, were interested. Neither do I find any case in which it has been denied that the court may, in its discretion, grant it, where an office is exercised in a corporation contrary to the charter. In England the number of corporations is very small, indeed, compared with the United States of America. Consequently the quantity of that kind of business which may be brought into our courts will be much greater than theirs. But that alone is not sufficient reason for rejecting it. We are now to decide a general question on the right of the court; not on the expediency of exercising that right, either on the present, or any other case.

"Now to establish it as a principle that no information can be granted in cases of what the counsel call private corporations might lead to very serious consequences. Perhaps it may be said that banks, and turnpike, canal and bridge companies are of a public nature; but yet they have no concern with the government of the country or the administration of justice. They are no further public than as they have to do with great numbers of people. But if the number alone is the criterion, it will often be difficult to distinguish public from private corporations. Let us consider churches, for example. In some the congregation is very small. How is the court to make the line of distinction? If you say the court has the right in both cases to grant or deny the information, according to its opinion of the expediency, there is no difficulty as to the right. But if it be alleged that there is a right in one case and not the other, the difficulty will be extreme. I strongly incline to the opinion that in all cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter, the court may, in its discretion, grant leave to file an information. Because, in all such cases, although it cannot be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed has no claim but from the grant of the commonwealth, and an unfounded claim is a usurpation, under pretense of a charter of a right never granted."

[1] State *v.* Lehre, 7 Rich. 234; King *v.* Stacey, 1 T. R. 1. In England, so far as relates to municipal offices, this is regulated by act of parliament. 9 Anne, ch. 20 (1711).

[2] Gunton *v.* Ingle, 4 Cranch (C. C.), 438.

SEC. 458. **Possession and user of the usurped office, essential.** — No information will lie unless there is a possession or user of the corporate office, and a usurped possession must be shown, as a condition precedent to the filing of an information.[1]

SEC. 459. **Non-user as a ground for forfeiture.** — It is held that to constitute grounds for forfeiture for non-user it should be a total non-user, and not a mere refusal to act as a corporation, or a mere refusal to pay, arising from insolvency.[2]

SEC. 460. **Destruction of the objects of the corporation as a ground of forfeiture.** — It is a general doctrine that whenever a corporation does an act or suffers an act to be done which entirely destroys the objects and purposes for which the corporation was instituted, it is a ground of forfeiture.[3]

SEC. 461. **Pleadings — evidence.** — It is not within the proper scope of this treatise to consider the subject of pleadings, practice and evidence, in their relation to proceedings in the nature of quo warranto. Special treatises are devoted to these subjects, in which the student may find these matters fully presented, not only in so far as they relate to private corporations, but also generally to all proceedings of that nature.

SEC. 462. **Judgment.** — It may be proper, however, to briefly consider the form, nature and effect of the judgment in such cases, where the proceedings relate to private corporations. On this subject Mr. High observes: "At common law the judgment upon the ancient writ of quo warranto, if for the respondent, was that he be allowed his office or franchise. And in case of judg-

[1] Queen *v.* Pepper, 7 Ad. & E. 745; People *v.* Thompson, 16 Wend. 655.

It is not sufficient to allege that the defendant has accepted the office without specifying the mode of acceptance. High on Extra. Leg. Rem., § 655. But if the party has acted in the office this is sufficient. Id. See, also, Queen *v.* Slatter, 11 Ad. & E. 505; Queen *v.* Quayle, id. 508; People *v.* Thompson, 16 Wend. 655.

Every presumption will be made in favor of long possession and use of a franchise. Queen *v.* Archdall, 8 Ad. & E. 281.

[2] People *v.* Bank of Niagara, 6 Cow. 196; People *v.* Bank of Hudson, id. 217; King *v.* Stacey, 1 T. R. 1. See, also, De Camp *v.* Alward, 52 Ind. 468; Importing, etc., of Ga. *v.* Locke, 50 Ala. 332; *Re* Franklin Tel. Co., 119 Mass. 447.

[3] State *v.* Real Estate Bank, 5 Ark. 595; People *v.* Bank of Hudson, 6 Cow. 217. See, also, *post*, ch. 20.

ment for the king for a usurpation of the franchise, or for its mis-user or non-user, a judgment of seizure into the king's hands was rendered if the franchise was of such a nature as to subsist in the hands of the crown; if not of such a nature, there was merely a judgment of ouster for the purpose of dispossessing the party. In case of judgment for a seizure of the franchises in the king's hands, all franchises incident and subordinate thereto, and held by the same grant, were also forfeited."[1]

Under proceedings in the nature of quo warranto the form of the judgment must depend upon the nature and character of the proceedings. In a case of quo warranto in New York, Chief Justice SAVAGE observes: "Whenever individuals or a corporation shall be found guilty either of usurping or intruding into any office or franchise, or of unlawfully holding it, judgment of ouster shall be rendered, and a fine may be imposed; but where the proceeding is against a corporation, and a conviction ensues for mis-user or non-user, or surrender, judgment of ouster and of dissolution shall be rendered, and it is equivalent to judgment of seizure at common law. If, therefore, the information in this case had for its object to oust the defendants from acting as a corporation and to test the fact of their incorporation, it should have been filed against individuals; if the object was to effect the dissolution of a corporation which had had an actual existence, or to oust such corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation."[2]

SEC. 463. **Nothing forfeited to the state but the franchise.** — Where there is a proper case for a judgment of forfeiture, and such judgment is entered, the rights and franchises of the corporation are remitted to the custody of the state. But it does not follow that the state is entitled to the property of the corporation. On the other hand it has been held to be error to award it to the state.[3]

[1] High on Extra. Leg. Rem., § 745; 3 Bl. Com. 263.

[2] People v. Saratoga & Rensselaer R. Co., 15 Wend. 113. See, also, People v. Bartlett, 6 id. 422; Smith v. The State, 21 Ark. 294.

[3] State Bank v. The State, 1 Blackf. 267. In this case, HOLMAN, J., observed.

"There are but two grounds on which it can be contended that the corporate effects fall into the hands of the state: 1st, as a forfeiture for abusing the franchises, or 2d, for the want

And "the judgment of seizure does not of itself work a dissolution."[1]

of an owner by the dissolution of the corporation. When we examine the first of these grounds, we find nothing in the books to support the idea that the abuse of corporate franchises occasions a forfeiture of lands, or goods, rights or credits, or, in fact, occasions any other forfeiture but the franchises themselves. The consequence of a breach of the implied condition on which their liberties were granted was not that they should forfeit their property or possessions if they abused their franchises, but only that they should forfeit their franchises. That which comes out of the hands of the king (or sovereign power), is the proper subject of forfeiture; the king, by the seizure, resuming what originally flowed from his bounty."

[1] High on Extra. Leg. Rem., § 577; 2 Kyd on Corp. 409.

CHAPTER XIX.

LIENS ON CORPORATE PROPERTY AND THEIR PRIORITY.

SEC. 464. **Corporate mortgages and bonds secured thereby.** — The statutes of various states provide that corporations, especially railroad corporations, may borrow money, and for that purpose may issue bonds and execute mortgages or deeds of trust to secure the same, and that said mortgages or deeds of trust may by their terms include and cover not only the property owned by them and *in esse*, at the time of the execution of such mortgages or trust deeds, but subsequently acquired property. Provision is also usually made by statute in reference to the recording of such instruments in order to give the mortgagees, or *cestui que trust*, liens on such property.

The expedient of raising money in this way is frequently resorted to, in order to enable railroad companies to complete their undertakings, where their paid-up capital is not adequate for the purpose.

The practice of issuing preferred stock in such cases amounts to about the same thing. The power in either case is liable to great abuse on the part of the managers of such corporations and has led to apprehensions of the most serious character.

Mr. Redfield suggests legislative action as a means of preventing the evils frequently resulting therefrom.[1]

[1] On this subject Mr. Redfield observes:

"In this country these mortgages have usually been so framed as to create successive liens, in the order of their being issued, as first, second, and third mortgage bonds. These are issued in large general sums, subdivided to suit the wants of purchasers in the market, and when sold at par and

SEC. 465. **Can the corporation by mortgage or trust deed give a lien on property thereafter to be acquired?** — The question whether a corporation can execute a mortgage that will be effectual as a lien on property not *in esse*, or on property thereafter acquired, has been the subject of controversy, but it seems now well settled that such liens attach under such circumstances at least under the provisions of statutes providing for such liens.[1] "A mortgage given

above, are perhaps the most unobjectionable mode of completing an enterprise that otherwise must stop *in modo*. But when sold, as they commonly are at reduced prices, in proportion to the waning fortunes of the company, they must of course destroy at once the credit of the stock and operate harshly upon its holders. This is not the place, nor are we disposed to read a homily upon the wisdom of legislative grants, or the moralities of moneyed speculations in stocks or on the exchange or elsewhere. But it would seem that legislation upon this subject should be conducted with sufficient deliberation and firmness so as not to invest such corporations with such unlimited powers as to operate as a net to catch the unwary, or as a gulf in which to bury out of sight the most disastrous results to private fortunes, which has justly rendered American investments, taken as a whole, a reproach, wherever the name has traveled. Experience will show that desperate enterprises require desperate means for their accomplishment, and will always find men for their management whose characters will conform more or less to the necessities of their position. And if by legislative restrictions they are precluded from the more obvious devices and expedients for the relief of their straitened fortunes, they will only be forced to the adoption of such as are more complex, less superficial, and consequently the more likely to seduce capitalists into their investments.

"But even this is no apology for such unrestricted powers as are often given to these companies. And the mode in which such things are here carried through the legislature, by means of agents who have, where there are no rival interests, very much their own way, without even the necessity of subjecting their plans to any permanent board of supervision, who shall have such matters under control and devote such time to their study, as not to be misled by the devices of the interested; this mode of accomplishing such things sufficiently explains why, in this country, no restrictions are placed upon such companies.

"If some reliable estimate of the cost of such undertakings were obtained by means of a board of trade or railway commissioners, and no work allowed to go forward until a large proportion, or the whole of the requisite capital, were obtained by stock subscriptions, it would afford great security. And if all mortgages, at whatever time given, were placed upon the same footing as to priority, it would give far less temptation to speculations in mere bubble investments, which is too much the case in this country. But there is perhaps no remedy for this incautious legislation in this country but the severe and hard discipline of that most painful but surest teacher, experience. It is, we think, rather creditable to the promoters of railways in this country that with such unlimited powers as their charters confer they have been so little abused, and this in the main not by design or for private ends, but through inexperience and want of skill." 2 Redf. on Rail., § 234.

[1] Willink *v.* Morris Canal & Banking Co., 3 Green's Ch. 377; Pierce *v.* Emery, 32 N. H. 484; Coe *v.* Pennock, 14 Ohio (N. S.), 187; Pennock *v.* Coe, 23 How. 117; Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. 254; Galveston R. Co. *v.* Cowdrey, 11 id. 483; United States *v.* New Orleans R. Co., 12 id. 362; Railroad Company *v.* Soutter, 13 id. 517; Williamson *v.* New Albany, etc., R. Co., 1 Biss. 198; Coe *v.* Columbus, etc., 10 id. 372; Howe *v.* Free-

on the entire property of a railway, including future receipts for transportation, with an agreement that property on the road subsequently acquired shall be bound, and a conveyance of it be duly executed, gives an equitable lien on property subsequently acquired, to the holders of the bonds secured by the mortgage."[1]

SEC. 466. **What may be conveyed by mortgage.** — It was formerly a mooted question whether in the absence of statutory provisions expressly authorizing it, a corporation could assign, or convey by mortgage or otherwise its franchises.[2] But it is now a common provision of the statutes that franchises, as well as all other kinds of property and interests, may be mortgaged by railroad corporations, and in such cases at least, the franchises may be conveyed by mortgage as security.[3] In *Jesup* v. *Bridge*, LOWE, C. J., observes: "As a matter of fact it is well known that railroads are built with capital. To obtain this, companies are compelled to conform to the laws and customs which regulate its use. They are dependent, in a great measure, upon the negotiation of their bonds for the means of carrying forward their enterprises. These bonds can only be negotiated by indemnifying, as best they can, the creditors for the principal debt, and secure the periodical payment of the accruing interest. For this purpose and as a means to an end, it becomes essential, frequently for the company to mortgage all its property and franchises, and

man, 14 Gray, 566; State *v.* Northern R. Co., 18 Md. 193; Morrill *v.* Noyes, 56 Me. 458; Haven *v.* Emery, 33 N. H. 66; Seymour *v.* Canada, etc., R. Co., 25 Barb. 284; Stevens *v.* Buffalo & N. Y. R. Co., 31 id. 590; Buffalo & N. Y. R. Co. *v.* Lampson, 47 id. 533; Benjamin *v.* Elmira R. Co., 49 id. 441; Philadelphia, etc., R. Co. *v.* Wœlpper, 64 Pa. St. 366; Ludlow *v.* Hurd, 1 Dis. (O.) 552; Coe *v.* McBrown, 22 Ind. 252; Pierce *v.* Milwaukee, etc., R. Co., 24 Wis. 551; Jessup *v.* Bridge, 11 Ia. 572; Dunham *v.* Isett, 15 id. 284. But generally mortgages do not cover after acquired property. Bath *v.* Miller, 53 Me. 308.

[1] 2 Redf. on Rail., § 235.

[2] 2 Redf. on Rail., § 235, 12, note 22; Wheelock *v.* Moulton, 15 Vt. 519; Isham *v.* Bennington Iron Co., 19 id. 230; Winch *v.* Railway Co., 5 De G. & S. 562; S. C., 13 E. L. & E. 506; S. Y. R. Co. *v.* Great N. R. Co., 3 De G. M. & G. 576; S. C., 19 E. L. & E. 513; Beman *v.* Rufford, 1 Sim. (N. S.) 550; S. C., 6 Eng. L. & Eq. 106; The S. & B. R. Co. *v.* The L. & N. W. R. Co., 4 De G. M. & G. 115; S. C., 21 E. L. & E. 319; Troy, etc., R. Co. *v.* Kerr, 17 Barb. 581; State *v.* Rives, 5 Ired. 297. See, also, Coe *v.* McBrown, 22 Ind. 252; Pennock *v.* Coe, 23 How. 117.

[3] First Mort. Bondholders *v.* Maysville & L. R. Co., 9 Am. R. Times, No. 31; cited 2 Redf. on Rail., § 235, 14, note 26.

See, also, Pierce *v.* Emory, 32 N. H. 484; Phillips *v.* Winslow, 18 B. Monr. 430.

even the future earnings after paying the necessary operating expenses." [1]

SEC. 467. **Rolling stock — character and quality of.** — It may be appropriate to notice the controversy which has occurred in reference to the character and nature of that property, necessary to the operation of railroads, and usually denominated "rolling stock."

This term embraces all the carriages, cars, engines and other vehicles, that move on wheels on railroad tracks. Is such property personal or real? Does it pass by a conveyance of the real estate? May it be sold and transferred as real property? Do the recording laws relating to real, or personal property, apply to it? Various decisions have been given in the various states on these questions. It has been, in many cases, both in the federal and state courts, a perplexing question, and of great interest to parties; and their remedy frequently turns upon the solution of it. The legislation of many of the states has settled the question and determined its character in this respect by statutory provisions.[2] But in others it is an open one, and the subject of controversy. In New Hampshire, in the absence of any statutory provisions on the subject, it has been held not to be a fixture or belong to the real estate; and this seems to be the doctrine in Massachusetts, Maryland, Wisconsin and Missouri.[3] But a contrary or some-

[1] 11 Ia. 578.

[2] Rolling stock is made personal property by a constitutional provision in Illinois. See Const. Ill., art. 11, § 10. The statutes of Neb. (1873) 197, provide, that "any mortgage or deed of trust made upon the lands, roads, or other property of any railroad company, shall bind all the property mentioned in such deed or mortgage, including rolling stock, and that to secure the rights of mortgagees and parties interested under deeds of trust, the rolling stock, personal property and material necessary for operating the road, belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds, when recorded, shall have the same effect both as to notice and otherwise, as to the real estate conveyed by them."

In Vermont, also, there is a statutory regulation on the subject. Vt. Gen. Stat. (1863) 237, §§ 101, 102; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452.

[3] Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410; Pierce *v.* Emory, 32 id. 485; Howe *v.* Freeman, 14 Gray, 566; McKim *v.* Mason, 3 Md. Ch. 201; Wells & Miller *v.* Canton Co., 3 Md. 241; Denmead *v.* Bank of Balt., 9 id. 179; Coe *v.* Columbus Piqua, etc., R. Co., 10 Ohio St. 372; Ludlow *v.* Hurd, 1 Dis. (O.) 552; Pacific R. Co. *v.* Cass Co., 53 Mo. 17; Hill *v.* Lacrosse, etc., R. Co., 16 Wis. 214.

As to the construction of the present statutes of Wisconsin on this question, see Chicago, etc., R. Co. *v.* Borough of Fort Howard, 21 Wis. 44.

what qualified doctrine has been adopted in various other states.[1]

SEC. 468. In a recent case in New York, commissioner JOHNSON, in reviewing the decisions on this question in that state, observes: "The first question necessarily to be decided in this case is, whether the rolling stock of a railroad is personal property, or whether it is to be deemed constructively annexed to the road upon which it runs, so as in law to be regarded as a part of the realty. If it be determined that rolling stock retains its character of personal property, then the question arises whether a mortgage of a railroad and its equipment needs to be filed under the statute of 1833, requiring mortgages of personal property to be filed when the possession of the property is not immediately delivered to the mortgagee.[2] * * * The questions thus presented are not authoritatively determined in this state. The opinion of the supreme court has been given in four reported cases. The earliest was that of the *Farmers' Loan & Trust Co.* v. *Hendrickson* (25 Barb. 484), in which the judgment rendered in October (1857), by Justice S. B. STRONG, BIRDSEYE, and DAVIES, declared that as between the mortgagees and judgment creditors, the rolling stock was to be deemed fixtures, and, consequently, that such a mortgage did not need to be filed under the act of 1833. In this case the mortgage specified engines, tenders, cars, etc., as a part of the property mortgaged, and the rights of the plaintiffs might have been sustained by holding either that the chattel mortgage law did not apply to railroad mortgages, or that the engine and cars were fixtures. The court rejected the former ground, and placed the decision on the position that the rolling stock was part of the realty.[3] * * * Looking now at the

[1] Covey v. Pittsburg, etc., R. Co., 3 Phila. 173; Ammant v. New Alexandria, etc., R. Co., 13 S. & R. 210. Applegate v. Ernest. 3 Bush. 649; Winchester T. Co. v. Vimonnt, 5 B. Monr. 2; Palmer v. Forbes, 23 Ill. 301; Hunt v. Bullock, id. 320; Titus v. Mabee, 25 id. 257; Titus v. Ginheimer, 27 id. 462. But these decisions in Illinois were, before the constitution was adopted fixing the character of rolling stock as personal property, alone referred to. In Indiana rolling stock is treated as realty for the purposes of taxation. Louisville, etc., R. Co. v. State, 25 Ind. 177.

[2] Laws 1833, ch. 279, p. 402.

[3] The learned judge proceeds to refer to numerous cases in that state, viz.: Beardsley v. Ontario Bank, 31 Barb. 619; Hoyle v. Plattsburgh, etc., Co. (same as now under consideration), 51 Barb. 45; Murdock v. Gifford, 18 N. Y. 30; Mott v. Palmer, 1 Comst. 564; Leroy v. Platt, 4 Paige, 77; as well as Pierce v. Emery, 32 N. H. 484; and Pennock v. Coe, 23 How 117.

rolling stock of a railroad, it is originally personal in its character, it is subservient to a mere personal trade, the transportation of freight and passengers. The track exists for the use of the cars rather then the cars for the use of the track. There is no annexation, no immobility from weight, there is no localization in use. The only element on which an argument can be based to support the character of realty, is adaptation to use, with and upon the track. Even in respect to this, were the same contrivances adopted by a tenant for the use in his trade upon leased lands, his right to remove both cars and track would be beyond question. It is perhaps fortunate that this question was not finally adjudicated in the early days of railroad enterprise, for then unity of ownership in track and cars and independence of roads of each other seemed to render it possible to consider rolling stock part of the realty without introducing great inconvenience. At the present time independent companies exist owning no tracks, whose trains run through state after state on the railroad track of other companies. It is no uncommon sight to see the cars of half a dozen companies formed into a single train and running from New York to Illinois and Missouri. It is impossible to deal with such property as a part of the realty without introducing anomalies and uncertainties of the gravest character." [1]

SEC. 469. The opinions of the supreme court of the United States have left this question in a state of uncertainty.[2] In *Minnesota Company* v. *St. Paul Company*,[3] NELSON, J., says: "We

[1] Hoyle *v.* Pittsburg, etc., R. Co., 54 N. Y. 314.

See, also, Benjamin *v.* Elmira, etc., R. Co., id. 675.

[2] See Farmers' Loan, etc., Co. *v.* St. Joseph, etc., R. Co. (U. S. C. C. Kansas, June Term, 1875, not reported.)

[3] 2 Wall. 609. See, also, Railroad Co. *v.* James, 6 Wall. 750. But see, also, Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. 35; Galveston R. Co. *v.* Cowdrey, 11 Wall. 450; United States *v.* New Orleans, etc., R. Co., 12 id. 362.

Previous to the decision of the court of appeals of New York, in Hoyle *v.* Plattsburgh, etc., R. Co., *supra*, the supreme court of that state, in the case of The Farmers' Loan and Trust Company *v.* Hendrickson, 25 Barb. 484, had held that the rolling stock of a railway was accessory to real estate, and would pass by a deed or mortgage of the railway, and that such a mortgage need not be filed as a chattel mortgage, under the recording laws of the state. In this case MR. Justice STRONG observed:

"The property of a railroad company consists mainly of the road-bed, the rails upon it, the depot erections and the rolling stock, and the franchise to hold and use them. The road-bed, the rails fastened to it, and the buildings at the depots are clearly real property. That the locomotives and passenger, baggage and freight cars

agree that the rolling stock upon this road is covered by the several mortgages, and as respects any other valid liens upon the same, is unseparably connected with the road; in other words, is

are a part and a necessary part of the entire establishment there can be no doubt. Are they so permanently and inseparably connected with the more substantial realty as to become constructively fixtures?

"Railways being a modern invention and of a novel character, we have no decisions upon this question, and those relating to and governing old and familiar subjects do not absolutely control us, although we must necessarily resort to them as guides. Judge WESTON well remarks, in Farrar *v.* Stockpole, 6 Greenl. 157, that modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning rods, which have now become common in this country and in Europe. Those might be removed from buildings without damage; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining thereto. The general principles of the law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. It may be that if an appeal should be made to the common sense of the community, the term 'fixtures' could not well be applied to such movable carriages as railway cars. But such cars move no more rapidly than do pigeons from a dovecote, or fish in a pond, both of which are annexed to the realty. Judge COWEN admits, in Walker *v.* Sherman, that a machine, movable in itself, may become a fixture, from being connected in its operations by boards, or in any other way, with the permanent machinery. It results from many cases that it is not absolutely necessary that things should be stationary in any one place or position, in order that they should be technically deemed fixtures. The movable quality of these cars has frequently, if not generally, induced the opinion that they are personal property. Hence, railway mortgages of rolling stock have, as I understand, been generally filed in the offices of the clerks of all the towns through which the roads pass. That was undoubtedly the more prudent course, as it saved any question as to the character of the property. Even the learned counsel has gone no further than to denominate the cars 'quasi' fixtures. Public opinion, however, although respectable in matters of fact, is an unsafe guide as to legal distinctions.

That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can, of course, be no doubt. Their wheels are fitted to the rails, they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company. [This claim is not justified by the facts in modern times. See opinion of JOHNSON, J., in Hayle *v.* Plattsburgh, etc., R. Co., *supra.*] They are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose; they are not like farming utensils, and possibly the machinery in factories and many of the movable appliances to stores and dwellings, the object of general trade; they are permanently used on the particular road where they are employed, and are seldom, if ever, changed to any other. Many of these are strong characteristics of the realty; some of them have often been deemed conclusive. * * * If railroad cars were used in any other place than upon the lands belonging to the company, or for any other purpose than in the execution of its business, or were constructed in such shape and so extensively as to become objects of general trade, or were not a necessary part of the entire establishment, I might consider myself as compelled by the weight of authority to decide, that as they are not physically

in technical language a fixture of the road, so far as in its nature and use it can be called a fixture."

SEC. 470. **Mechanics' and constructors' liens.** — It has been a common provision of the statutes of many if not most the states that mechanics, laborers, and the furnisher of materials might secure a lien upon the building, erection or improvement upon which the labor was bestowed or for which the material was furnished, and the land on which the erection or improvement is located, for the labor done or material furnished, upon complying with certain provisions of the statute in relation thereto.

SEC. 471. The legislatures of various states have extended these liens, and by express provisions of statutes, they embrace the work and labor done, and material furnished on or about any work of internal improvement, including the construction of railroads, and give to the laborer or furnisher of material on such works the same remedy formerly limited to buildings and other improvements of private individuals. The general principles and doctrines of the courts in the interpretation of such statutes and their application, relating to natural persons, would be equally applicable to corporations. These must necessarily depend upon the language and provisions of the statutes, and hence no general rules can be laid down as applicable, to cases generally.[1]

anexed to what is usually denominated real estate, they must be deemed personal property; but as each and all of these characteristics or incidents are wanting, the considerations which I have mentioned, or to which I have alluded, leading to an opposite conclusion, require us to determine that they are included as fixtures or necessary incidents in a conveyance of real estate. In thus deciding we shall unquestionably carry out the intention of the parties, as it could not have been the design of such parties — certainly not of the mortgagees — that the security should be diminished by the wear and tear of the machinery, and the inevitable accidents to which it is subjected. Possibly the substituted machinery might not be included in the mortgage, if it should be deemed personal property, and few, if any, would be willing to loan their money upon such an uncertainty, but it would be otherwise if the additions should be considered as made to the real estate." See, also, same doctrine in Palmer v. Forbes, 23 Ill. 300; Hunt v. Bullock, id. 320; Pennock v. Coe, 23 How. 117.

The reasoning of the learned judge in this case is based upon certain facts. But the facts themselves cannot be assumed to be correct, as shown by the court in the subsequent case in the court of appeals in the same state. See Hoyle v. Plattsburgh, etc., R. Co., *supra*.

[1] A provision of statute of Iowa will, perhaps, indicate the general scope and purpose of such statutes. It is as follows: "Every mechanic, or other person who shall do any labor upon or furnish any materials, machinery

SEC. 472. **Priority between mortgage and mechanics' liens.** — Controversies have recently arisen between mortgagees and the laborers, contractors and builders of railroads, in reference to the priority of their respective liens. The question must depend upon the language and construction of the provisions of the statutes in reference to such liens.

SEC. 473. The statutes of Iowa provide in reference to railroad mortgages and trust deeds, that "said mortgages or deeds of trust may, by their terms, include and cover not only the property of the corporation making them at the time of their date, but property, both real and personal, which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof." And in reference to the liens of parties "who shall do any labor or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement," that "the lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien or

or fixtures for any building, erection or other improvement upon land, including those engaged in the construction or repair of any work of internal improvement by virtue of any contract with the owner, his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this chapter, shall have for his labor done or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner on which the same is situated, to secure the payment of such labor done or materials, machinery or fixtures furnished." Iowa Code (1873), ch. 14, § 2130.

It is provided by other sections for the filing of such liens with the clerk of the district court of the county, and giving notice of the same. It is further provided in reference to the priority of such liens as follows:

"The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon such buildings, erection or other improvement, and to the land on which the same is situated or either of them, made subsequent to the commencement of said building, erection or other improvement." Id., § 2139.

"The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage, upon the land upon which the same is erected or put, and any person enforcing such lien may have such buildings, erections or other improvements for which they were furnished or done in preference to any prior lien, or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." Id., § 2141.

incumbrance, or mortgage, upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter;" that "the liens for labor done or things furnished, shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or other improvement." Under these provisions it has been held that the mechanic's, laborer's or furnisher's lien, dates from the commencement of the structure, and is paramount to a mortgage executed after the commencement of the same, though before the particular work was done or materials furnished for which the lien is claimed.[1]

[1] Iowa Code (1873). §§ 2131, 2132–2139, 2140, 2141. Nelson *et al. v.* The Iowa Eastern R. Co., defendant and others, intervenors, West Jur., V. 10, No. 10, p. 604 (to be reported in 44 Ia.)

In this case Nelson and others claimed of the railroad company $2,-180.82 on account of ties furnished the company for the construction of its road, and asked that a lien therefor might be established under the statutes of Iowa. The intervenors alleged that they were the holders of bonds of the company secured by a mortgage upon the road, and entitled to priority by virtue of such mortgage over the lien of the plaintiffs. The court gave judgment for the claim against the company subject to the lien of the intervenors. On appeal to the supreme court of that state, ADAMS, J., delivering the opinion, observed as follows: "It is claimed by the plaintiffs that the intervenors' mortgage was executed after the commencement of the improvement. It is claimed by the intervenors that it was executed before. The fact is, the mortgage was executed after the road was commenced, but before the ties were furnished. We have only to determine then what is the 'improvement' within the meaning of the statute. If it is the road, the mechanics' lien has priority. If it is the ties, the mortgage has priority. * * * The idea that the mechanic's lien attaches only from the commencement of the particular work is wrought out through the supposition that the word 'improvements,' as used in the statute, denotes the several distinct and successive jobs of work performed by the different mechanics. But this construction is precluded by the use of the word 'other' before 'improvements.' The lien is to attach from the commencement of 'the building erection or other improvements.' The statute implies that a building is an improvement and that there may be others still. We understand by 'other improvements,' the results of mechanical labor or materials furnished other than buildings or erections upon real estate. But suppose 'other improvements' to mean the different parts of a building. It follows that a building is one improvement, its walls another, and its doors a third. But the walls of a building are not other than the building. The words 'other improvement,' as used in the statute, cannot properly mean either buildings, erections or constituent parts thereof.

"Besides a constituent part of a thing is not an improvement of a thing, in any proper sense of the word. How can we say that the walls of a house are an improvement of the house?

SEC. 474. The same doctrine was held in construing a similar statute in Montana, which provided: "The liens for work and labor done, or things furnished, as specified in this act, shall have

The house could have no antecedent existence. Ties and rails are not an improvement of a railroad for the same reason. Yet whatever is an improvement is an improvement of something. A house is an improvement of the premises on which it is situated. A railroad is an improvement of the country which is benefited thereby. That which enters into the original construction of a house or railroad is a part of an improvement and nothing more. * * * But it is said that it would be unjust to the mortgagee who has taken a mortgage upon a partially constructed building, erection or other improvement, to make his mortgage subject to mechanics' liens for work subsequently commenced. It is argued that the mechanic may always know what incumbrances rest upon the property by mortgage, but that the mortgagee cannot know what incumbrances may come to rest upon the property by mechanics' liens. To this, it may be said that where a person takes a mortgage upon a partially constructed building, erection, or other improvement, the possibility of mechanics' liens attaching upon the property is distinctly foreshadowed by the condition of the property. It is true, the mortgagee cannot know the amount. He cannot know, indeed, at the time the mortgage is executed, whether the building, erection, or other improvement will be completed by the mortgagor. But we think that the mortgagee may properly be required to rely upon the good faith and prudence of the person whom he elects to make his mortgagor. Furthermore, the increased value of the security may be presumed to be somewhat in proportion to the expense incurred upon the property. Without denying that the statute, as we construe it, may sometimes work a hardship, the danger to be apprehended is not such as to exert much influence in the construction of the statute, the language employed being almost, if not entirely, free from ambiguity. Another objection urged against this construction of the statute is, that it may be impracticable oftentimes for the mortgagee to determine whether a building, erection, or other improvement, has or has not been commenced upon the premises. It has been asked in argument, whether a mortgagee of a railroad shall take notice that the construction of the road has been commenced if only a shovelful of dirt has been thrown.

"This objection, whether great or small, applies equally to the construction contended for by the intervenors. If the statute should not be construed as requiring notice to be taken of the commencement of a railroad, because that may consist in the throwing of a shovelful of dirt, it should not, for the same reason, be understood as requiring that notice should be taken of the commencement of any particular job of work upon the railroad, for that, too, must be equally small. It is further objected, that a building, erections, or other improvement, when partially constructed, is sometimes abandoned and the work is afterward resumed. If, in the meantime, a mortgage has been executed upon the premises the mortgagee having no reason to suppose that the work would be resumed, he might, it is said, be virtually deprived of his security without any fault or negligence on his part. What should be the rule in such a case it is not proper for us now to determine. It is sufficient for us to say that we do not think that such a case would involve any great difficulty. If a partially erected structure is in a condition to be completed, we doubt whether the mortgagee would be justified in presuming that a cessation of the work, however long continued, was an absolute abandonment.

"In regard to the policy of the statute, as we construe it, this may be said: It is not desirable that the execution of a mortgage upon the land, upon which a building or other improvement is in process of construction, should arrest the work and prevent its completion. Both mortgagor and mortgagee are interested in its completion. Without it, the money already expended must ordinarily to a great extent be lost. Take the pres-

priority in the order of filing the accounts thereof, as aforesaid, and shall be prior to all other liens and incumbrances which may be attached to or upon the building, erection, or other improvement, and to the land upon which the same is situated, to the extent aforesaid, or either of them, made subsequent to the commencement of said building, erection or other improvement."

In construing this statute the supreme court of the United States (per BRADEY, J.) observe: "The liens secured to the mechanics and material men have precedence over all other incumbrances put upon the property after the commencement of the building. And this is just. Why should a purchaser or lender have the benefit of the labor or materials which go into the property and give it its existence and value? At all events, the law is clear."[1] The same question was recently presented to the United States circuit court for the district of Iowa, where the controversy was between the mortgagees of a railway company and the builders, laborers and material men, as to the priority of their respective liens under the Iowa statute; and where it was held that the liens of the latter, following the decisions of the state court, dated from the commencement of the building of the railway, and not from the time when the particular work was done or the material furnished.[2]

ent case as an illustration: The intervenors are holders of mortgage bonds upon a road, sixteen miles of which had been graded at the time the mortgage was made. The value of their security depended upon the further construction of the road; they foresaw that work and materials must be furnished by somebody, or nothing could be realized from what had been done. Yet, the construction of the statute they contended for would require the mortgagor to keep a fund on hand for the daily payment of the laborers and material men, or that the work and material should be practically furnished without security."

[1] Davis v. Bilsland, 18 Wall. 659. See, also, Dubois v. Wilson, 21 Mo. 214; American Fire Ins. Co. v. Pringle, 2 S. & R. 138; Wells v. Canton Co., 3 Md. 234; Getchell v. Allen, 34 Ia. 559, where it is observed by BECK, J., that "the word 'improvement,' as here used, does not mean an addition to or betterment of a building, but is applied to some independent erection on the land."

[2] Taylor *et al.*, Trustees, v. The Burlington C. R. R. & M. Co., West. Jur., vol. 11, No. 6, p. 336 (May Term, 1877.)

In this case, DILLON, J., observes: "The trustees in these mortgages resist the right to any lien whatever in many cases [then pending in the court involving the same question] and particularly resist the establishment of a mechanics' lien in any case where the labor was done or the materials were furnished after the recording of the mortgage, which shall have priority over the mortgage. There are also questions as to the lien for repairs after the road has been completed as distinguished from the right to a lien for original construction; and ques-

SEC. 475. These decisions relate to the construction of local statutes. But as the statutes of various states have similar provisions, we have deemed it a matter of sufficient interest to refer to the decisions where the statutes have been construed, and to set forth the reasoning and determination of the courts, both state and national, in relation thereto.

tions also as to limitation of the lien of the mechanic. * * * The mechanics' lien statute (Code, §§ 2130–2132) extends *inter alia* to all persons 'who construct or repair any work of internal improvement,' including railways, and gives a lien 'for labor done or materials, machinery or fixtures furnished' upon 'such building, erection or improvement, and upon the land belonging to the owner on which the same is situated.' * * * Section 2139 first provides for the priority of mechanics' liens as among themselves, making the same depend upon the order of filing, and then proceeds to enact that such liens 'shall be preferred to all other liens and incumbrances which may be attached to or upon such building, erection or other improvement and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or improvement.' The lien extends to the entire land to the extent of the interest of the person for whom the mechanic did the work or furnished the materials, and to a leasehold interest, as to which the provision is that the forfeiture of the lease shall not impair the mechanic's lien as to the buildings, but the same may be sold to satisfy the lien and be moved off within thirty days after the sale (§ 2140).

"Section 2141 provides for still another case, in these words: 'The lien for the things aforesaid, or work, shall attach to the buildings, erection, or improvements for which they were furnished or done, in preference to any prior lien, or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person, enforcing such lien, may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.' (Sec. 2.510). We hold as follows: 1. Sec. 2,139 contemplates and provides for a case where at the time of the commencement of the building or railway, there is no recorded lien or incumbrance thereon, and where such lien or incumbrance is created subsequent to the commencement of the building of the railway; in which case the mechanic has a lien which relates back to the commencement of the building or railway, although the particular work of that mechanic was done or his materials were furnished after a mortgage was recorded or lien created."

In *Ohio & Miss. R. Co.* v. *Davis*, 23 Ind. 553, the supreme court of Indiana held, in reference to the appointment of a receiver, that it did not operate to derange the priority of legal or equitable liens; that money or property in his hands was in the custody of the law, and that he held it for whoever was entitled to it; that where there are various mortgagees, if prior mortgagees do not assume possession of the property or take steps to foreclose their mortgages, any subsequent incumbrancer may have a receiver appointed to take the rents and profits for his benefit, until those who have a prior right claim them by some proceeding for that purpose; but that a subsequent incumbrancer who has received rents and profits will not be compelled to refund to a prior incumbrancer who subsequently takes possession or brings suit.

CHAPTER XX.

DISSOLUTION.

SEC. 477. **Causes for which corporations may be dissolved, or which constitute a dissolution.**—There are various modes in which moneyed corporations may be dissolved, and various causes for such dissolution. They may be dissolved: 1. By virtue of a power reserved in the legislature, by the act or general law, by or under which they were created, or by other general laws or constitutional provisions. 2. By expiration of the time limited for their continuance, either by the special or general statutes, by or under which they were created. 3. For neglect or abuse of their franchises. 4. By the voluntary acts of the members. 5. By proceedings under statutes relating to dissolution and the winding-up of the affairs of the corporation.

SEC. 478. **Reserved power in the legislature to dissolve.**—The power of parliament according to the British constitution being omnipotent, it could dissolve any public or private corporation. The power could be exercised in an arbitrary manner, but it has "to the honor of the British nation" seldom been exercised. And

those instances of arbitrary exercise of it, have been characterized by Lord THURLOW as "an atrocious violation of private property, which cut every Englishman to the bone." But in this country, although the power of our legislatures in the various states is, unless restrained by our written constitutions, as omnipotent as the parliament of Great Britain; yet in respect to repealing or amending charters, they are restrained at least by that provision of the Federal constitution, which prohibits any state law, impairing the obligation of contracts.[1] The doctrine, as we have seen in this country, is, that the provisions of a charter or of general statutes providing for incorporation, when once accepted by the corporators, becomes a contract between the state and them, and the state cannot violate this contract or in any manner change or avoid it by legislative action, without the consent of the corporators.[2]

But this doctrine has no application where the right to resume, alter or amend the franchises or charter conferred upon a corporation was contained in the special or general statutes under which it was constituted, or in the constitution or general laws of the state, at the time of its creation. And where such a power exists in any of these ways, the legislature in its discretion, and by virtue of its paramount authority, may exercise it in respect to any of the reserved powers, and such use of its powers will not violate the original contract.[3]

[1] Const. U. S., art. 1, § 10.

[2] See *ante*, §§ 35, 36; Dartmouth College *v.* Woodward, 4 Wheat. 518; 2 Kent's Com. 305 *et seq.;* Green *v.* Bidde, 8 Wheat. 1; Fletcher *v.* Peck, 6 Cranch, 88; State *v.* Wilson, 7 id. 164; Terrett *v.* Taylor, 9 id. 43; Town of Pawlett *v.* Clark, id. 292; Brooklyn C. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 358; McLaren *v.* Pennington, 1 Paige, 107; Wales *v.* Stetson, 2 Mass. 143; Regents, etc., *v.* Williams, 9 G. & J. 402; Payne *v.* Baldwin, 3 S. & M. 661; Aberdeen Female Acad. *v.* Aberdeen, 13 id. 645; Young *v.* Harrison, 6 Ga. 130; Bush *v.* Shipman, 4 Scam. 190; People *v.* Marshall, 1 Gilm. 672; Bruffett *v.* Great W. R. Co., 25 Ill. 353; People *v.* Jackson P. R. Co., 9 Mich. 285; State *v.* Com. Bk., etc., 7 Ohio, 125; State *v.* Wash. Soc. Lib., 9 id. 96; Michigan Bk. *v.* Hastings, 1 Doug. (Mich.) 225; Yarmouth *v.* North Yarmouth, 34 Me. 411; City of Louisville *v.* University of Louisville, 15 B. Monr. 642; Boston R. Co. *v.* Salem R. Co., 2 Gray, 1; Commonwealth *v.* New Bedford Br., id. 339; Aurora T. Co. *v.* Holthouse, 7 id. 59; Enfield Toll Br. Co. *v.* Connecticut Riv. Co., 7 Conn. 53; Ang. & Am. on Corp., § 767.

[3] See *ante*, ch. 3, §§ 46, 47. See, also, Bailey *v.* Methodist Epis. Ch., 6 R. I. 491; Hyatt *v.* Whipple, 37 Barb. 595; Miners' Bank *v.* United States, 1 Morris (Ia.), 482; Erie R. Co. *v.* Casey, 26 Pa. St. 287; Sherman *v.* Smith, 1 Black. 587; In the matter of the Reciprocity Bank, 29 Barb. 369; 22 N. Y. 9; Suydam *v.* Moore, 8 Barb. 358; Massachusetts Gen. Hosp. *v.* State Asso. Co., 4 Gray, 227; Bangor R. Co. *v.* Smith, 47 Me. 34.

SEC. 479. The reserved power in such cases may exist, as we have suggested, either in the charter granting the franchise or in the general acts for incorporation, or in the general laws of the state applicable to all cases, or in the constitution of the state. And this power may be absolute and unqualified, or it may be limited and qualified. Thus, it is sometimes provided, only, that the power may be exercised in case the corporation shall fail to go into operation, or in case it shall abuse or misuse its franchises.[1]

SEC. 480. **Where the reserved power is subject to a condition.**— Where the right to exercise the reserved power is unqualified, the legislature may repeal the act at any time in their discretion; and even a creditor who may be thereby prejudiced cannot interpose to prevent the exercise of it, even though he may have a suit pending against the corporation and property attached therein.[2]

When the right is qualified, in the manner we have noticed, the legislature, it seems, may determine the questions as to the sufficiency of the cause under the qualifying provisions, and repeal or amend the charter according to the power reserved.[3] Under a statute of Massachusetts which provided that every act of incorporation shall, at all times, be subject to amendment, alteration or repeal, at the pleasure of the legislature, provided that no act of incorporation shall be repealed unless for some violation of its charter or other default, when the duration of the

[1] Dartmouth College *v.* Woodword, 4 Wheat. 518; Terrett *v.* Taylor, 9 Cranch, 51; 4 Wheat. 661; Mumma *v.* Potomac Co., 8 Pet. 281; Penobscot Boom Co. *v.* Lamson, 16 Me. 224; Hodsdon *v.* Copeland, id. 314; Paschall *v.* Whetsett, 11 Ala. (N. S.) 472; Mobile, etc., R. Co., *v.* State, 29 id. 573; State *v.* Bradford, 32 Vt. 50; Commonwealth *v.* Union Ins. Co., 5 Mass. 230; Charles Riv Br. *v.* Warren Bridge, 7 Pick. 371; People *v.* Manhattan Co., 9 Wend. 351; People *v.* Kingston, etc., T. Co., 23 id. 193; People *v* Bank of Niagara, 6 Cow. 195; People *v.* Washington Bank, id. 211; People *v.* Bank of Hudson, id. 217; People *v.* Dispensatory, etc., Soc., 7 Lans. 305; Lehigh Bridge Co. *v.* Lehigh Coal Co., 4 Rawle, 9; Commonwealth *v.* Commercial Bank, 28 Pa. St. 383; Commonwealth *v.* Pittsburgh, etc., R. Co., 58 id. 26; State *v* Commercial Bank, 33 Miss. 474; Washington, etc., R. *v.* State, 19 Ind. 239; Canal Co. *v.* Railroad Co., 4 G. & J. 1; Atchafalaya Bank *v.* Dawson, 13 La. 497, State *v.* Pawtuxet T. Co., 8 R. I. 182, 521; Mc Intire Poor School *v.* Zanesville Canal Co., 9 Ohio, 203; John *v.* Farmers' Bank, 2 Black. 367; Ang. & Am. on Corp. 774.

[2] Read *v.* Frankfort Bank, 23 Me. 318; Crease *v.* Babcock, 23 Pick 334; Erie R. Co. *v.* Casey, 26 Pa. St. 287; Miners' Bank *v* United States, 1 Greene (Ia.), 553; State *v.* Curran, 7 Eng. (Ark.) 321.

[3] Crease *v.* Babcock and Erie R. Co. *v.* Crasey, *supra.*

same is limited by some express provision, it has been held, that the legislature may determine in what manner a railroad shall exercise its franchises, and may provide for changes in the level, grade and connections thereof; direct the construction of a new connecting track, and in what manner and under whose supervision the work shall be done and how paid for;[1] that it may require a station-house to be built at a particular place,[2] and require several railroad corporations, having tracks terminating in a city, to unite at one station.[3]

But it has been further held, that the legislature is not the final judge of the existence of the conditions upon which the right to declare a forfeiture depends, and that, whether the facts warrant the exercise of the power or not, is for the determination of the courts; that the courts must declare a forfeiture and not the legislature;[4] and that the courts can inquire into the facts and determine from them whether there are grounds for forfeiture, and according to such finding and determination of the courts, the act of the legislature on the subject, is valid or void.[5]

SEC. 481. **Expiration of the time limited for its continuance.** — Another mode in which a corporation may be dissolved is by expiration of the time for which it was created. This time is frequently, if not generally, fixed in the constating instruments, or by some general law. If the limit of corporate power is thus fixed, when the time arrives the corporation is dissolved with all the consequences of a dissolution by any other mode.[6] But if the continuance beyond a certain time is made to depend upon the performance of a certain condition, the non-performance of it has been held a mere ground of forfeiture, and not an absolute dissolution.[7]

[1] Fitchburg R. Co. *v.* Grand Junction R. Co., 4 Allen, 198.

[2] Commonwealth *v.* Eastern R. Co., 103 Mass. 254.

[3] Mayor, etc., of Worcester *v.* Norwich R. Co., 109 Mass. 103. See, also, Parker *v.* Metropolitan, etc., R. Co., 109 Mass. 506; Commissioners *v.* Holyoke Water Power Co., 104 id. 446; affirmed Holyoke, etc., Co. *v.* Lyman, 15 Wall. 500.

[4] Bruffett *v.* Great West. R. Co., 25 Ill. 353; Commonwealth *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Erie R. Co. *v.* Casey, 26 id. 287.

[5] Id. See, also, Commonwealth *v.* Essex Co., 13 Gray, 239; Delaware R. Co. *v.* Tharp, 5 Harr. 454; Curran *v.* State, 15 How. 304; Flint, etc., P. R. Co. *v.* Woodhull, 25 Mich. 99.

[6] Bank of Mississippi *v.* Wrenn, 3 S. & M. 791; Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8; Ang & Am., § 778 a; Wilson *v.* Tesson, 12 Ind. 285.

[7] La Grange, etc., R. Co. *v.* Rainey, 7 Cold. 420.

The common remedy for avoiding in such cases the reversion or forfeiture of property, the loss of debts, and other ordinary consequences of a dissolution, where the statute does not provide for a continuance of corporate powers for the purpose of closing up its affairs, is to make a transfer of the property and interests of the corporation to a trustee for the benefit of stockholders or creditors, before the period for dissolution occurs.[1]

But it has been held, in reference to municipal corporations dissolved by repeal of charters, that the rights of creditors will be protected from invasion, by the constitution of the United States.[2]

SEC. 482. **Neglect or abuse of powers.** — This is one of the most common causes for dissolution. The contract between the state and the corporators, on the acceptance of the provisions of the statute relating to incorporation for private and pecuniary purposes, becomes, as we have seen, inviolable. But the condition imposed upon the corporators is, that they shall carry out the purposes of the corporation on their part, and not assume powers not conferred upon them by virtue of the authority given. A neglect of duty or abuse of the power, or an assumption of authority not conferred, is ground of forfeiture of the franchise.[3] But in these cases it can only be dissolved by the judicial determination of a court, on an inquiry into charges made in this respect, and which authorize a decree of dissolution.[4]

[1] Id. See, also, Cooper *v.* Curtis, 30 Me. 488; Ingraham *v.* Terry, 11 Humph. 572; Nicoll *v* New York R. Co., 12 Barb. 460; People *v.* Walker, 17 N. Y. 502, as to construction.

[2] Lansing *v.* Treasurer, etc., 1 Dill. (C. C.) 522; Butz *v.* Muscatine, 8 Wall. 575; Gelpcke *v.* Dubuque, 1 id. 175; Thomson *v.* Lee, 3 id. 327; Soutter *v.* Madison, 15 Wis. 30; Smith *v.* Appleton, 19 id. 468; Blake *v.* Railroad Co., 39 N. H. 435.

[3] See *ante*, note § 456, *et seq.;* 2 Kyd on Corp. 474; Wilcoc. on Corp. 334; 1 Black. Com. 485; 2 Kent's Com. 312 *et seq.;* Taylors of Ipswich *v.* Sherring, 1 Roll. 4; Rex *v.* Grosvenor, 7 Mod. 199; Rex *v.* Saunders, 3 East, 119; Rex *v.* Pasmore, 3 T. R. 246; Eastern Archipelago Co. *v.* Reginam, 2 E. & B. 857; 22 E. L. & Eq. 328; S. C., 1 Ellis & B. 310; 18 E. L. & Eq. 167; STORY, J., in Ferrett *v.* Taylor, 9 Cranch, 51; Dartmouth College *v.* Woodward, 4 Wheat. 658; Penobscot Boom Co. *v.* Lamson, 16 Me. 224; Hodsdon *v.* Copeland, id. 314; All Saints Church *v.* Lovett, 1 Hall, 198; John *v.* Farmers' Bank, 2 Blackf. 367; Hamtramck *v.* Bank of Edwardsville, 2 Mo. 169; Day *v.* Stetson, 8 Greenl. 372; State *v.* New Orleans Gas L. Co., 2 Rob. (La.) 529; Commonwealth *v.* Commercial Bank, 28 Pa. St. 383.

[4] Id. See, also, Turnpike Co. *v.* State, 3 Wall. 210; People *v.* Society, etc., 1 Paine (C. C.), 660; State *v.* Bradford, 32 Vt. 50; Lea *v.* American Canal Co., 3 Abb. Pr. (N. S.) 1; Kishacoquillas T. R. Co. *v.* McConaby, 16 S. & R. 145; Canal Co. *v.* Railroad Co., 4 G. & J. 1; University of Maryland *v.* Williams, 9 id. 365; Washington & B. T. R. *v.* Maryland, 19 Md. 239; State *v.* Cincinnati, 23 Ohio St. 445; Baker *v.* Backus, 32 Ill. 79; Lindell *v.*

SEC. 483. The dissolution in such cases must be decreed by a court of competent jurisdiction, and for the right to claim a forfeiture, it may be waived by the state.[1]

On this subject the supreme court of New York observe: "Where a corporation has abused its power, or committed acts which are unlawful, it nevertheless continues legally to exist as a corporate body until the state or government which created it shall, by a proper proceeding, procure an adjudication and enforce a forfeiture of the charter. But all such proceedings are at the instance and on behalf of the state or government. Acts which are improper do not of themselves work a dissolution."[2] And in all such cases the state may waive its right to forfeiture, for the failure of the corporation, fully to perform its contract with it, in the same way as an individual may waive breaches of contract. This may be by some act of the legislature recognizing the corporation after previous acts, which would warrant a judgment of forfeiture;[3] or it may be by a refusal or neglect to prosecute the delinquent corporation for the purpose of obtaining a judgment of forfeiture by a competent court.[4] But in order to infer a waiver of the default of a corporation and of the conditions of a charter, by legislative action, the intention in this respect must be distinctly declared by the legislature, or it must be clearly inferable from its acts.[5]

Benton, 6 Mo. 361; Attorney-General *v.* Tudor Ice Co., 104 Mass. 239; Attorney-General *v.* Bank of Niagara, 1 Hopk. 324; Slee *v.* Bloom, 5 Johns. Ch. 366; S. C., 19 Johns. 456; Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. 84; Doyle *v.* Peerless, etc., Co., 44 Barb. 239; State *v.* Merchants' Ins., etc., Co., 8 Humph. 235; Baker *v.* Backus, 32 Ill. 79; State *v.* Commercial Bank, 33 Miss. 474; State *v.* Urbana Ins. Co., 14 Ohio, 6; Commonwealth *v.* Fitchburg R. Co., 12 Gray, 180; Ward *v.* Sea Ins. Co., 7 Paige, 294; Jackson Marine Ins. Co., 4 Sandf. Ch. 559; People *v.* Washington Bank, 6 Cow. 211; People *v.* Bristol T. Co., 23 Wend. 222; State *v.* Favell, 4 Zabr. 370; Dill on Corp., § 713 *et seq.*

[1] State *v.* Paterson, etc., T. Co., 1 Zabr. 9. See, also, Ang. & Am. on Corp., § 777, and cases cited in notes.

[2] Ormsby *v.* Vermont Copper Mining Co., 65 Barb. 360; People *v.* Manhattan Co., 9 Wend. 351; Bank of Niagara *v.* Johnson, 8 id. 645; Bear Camp Riv. Co. *v.* Woodman, 2 Greenl. 404; Mickles *v.* Rochester City Bank, 11 Paige, 118; People *v.* Hilsdale T. Co., 23 Wend. 254.

[3] State *v.* Paterson, etc., R. Co., 1 Zabr. 9.

[4] State *v.* Mississippi, etc., R. Co., 20 Ark. 495; State *v.* Fourth N. H. Turnp. Co., 15 N. H. 162; People *v.* Manhattan Co., 9 Wend. 351; Same *v.* Fishkill P. R. Co., 27 Barb. 445; Baltimore, etc., R. Co. *v.* Marshall Co., 3 W. Va. 319.

[5] Commonwealth *v.* Union Ins. Co., 5 Mass. 230; Chester Glass Co. *v.* Dewey, 16 id. 94; Boston Glass Man. *v.* Langdon, 24 Pick. 52; Quincy Canal *v.* Newcomb, 7 Metc. 276; Knowlton *v.* Ackley, 8 Cush. 95; Heard *v.* Talbot, 7

SEC. 484. **Mode of proceeding in such cases.**— We have observed that in certain cases the corporation may be dissolved without any adjudication to that effect, as where the time of its limitation has expired, and there is no condition annexed to the charter in this respect.[1]

But in other cases, an adjudication may be necessary, in order to determine its rights and prevent future action.

The ancient common-law modes of procedure for this purpose were by *scire facias* or quo warranto. The former, it has been considered, was the proper mode of proceeding, where a corporation had a legal existence and was capable of acting, but by reason of neglect or abuse of its powers it should no longer be permitted so to do; the latter, where an association or body corporate *de facto* undertakes to act as a lawful corporate body, but

Gray, 120; Brookville T. Co. *v.* McCarty, 8 Ind. 392; Cleveland, etc., R. Co., *v.* City of Erie, 27 Pa. St. 380; Commonwealth *v.* Allegheny, etc., Co., 20 id. 185; Dyer *v.* Walker, 40 id. 157; Vermont, etc., R. Co. *v.* Vermont C. R. Co., 34 Vt. 57; Connecticut R. Co. *v.* Bailey, 24 id. 465; Silver Lake Bank *v.* North, 4 Johns. Ch. 379; Slee *v.* Bloom, 5 id. 366; 19 Johns. 456; Vernon Society *v.* Hills, 6 Cow. 23; Thompson *v.* New York R. Co., 3 Sandf. Ch. 652; Caryl *v.* McElrath, 3 Sandf. 176; Enfield Toll Br. Co. *v.* Connecticut Riv. Co., 7 Conn. 46; Pearce *v.* Olney, 20 id. 544; Kishacoquillas T. Co. *v.* McConaby, 16 S. & R. 145; Dyer *v.* Walker, 40 Pa. St. 157; Brookville T. Co. *v.* McCarty, 8 Ind. 392; John *v.* Farmers' Bank, 2 Blackf. 367; Peirce *v.* Somersworth, 10 N. H. 375, per PARKER, C. J.; State *v.* Fourth N. H. Turnp. Co., 15 id. 162; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 124, 141; Bohannon *v.* Binns, 31 Miss. 355; Crump *v.* United States Min. Co., 7 Gratt. 352; Canal Co. *v.* Railroad Co., 4 G. & J. 1; Planters' Bank *v.* Bank of Alexandria, 10 id. 346; University of Md. *v.* Williams, 9 id. 365; Hamilton *v.* Annapolis R. Co., 1 Md. Ch. Dec. 107; Atchafalaya Bank, *v.* Dawson, 13 La. 497; State *v.* N. O. Gas. L. Co., 2 Rob. (La.), 529; Webb *v.* Moler, 8 Ohio, 548; Bank of Cir. *v.* Renick, 15 id. 322; Johnson *v.* Bentley, 16 id. 97; Myers *v.* Manhattan Bank, 20 id. 283; Bank of Mo. *v.* Merchants' Bank, 10 Mo. 123; Bank of Galliopolis *v.* Trimble, 6 B. Monr. 599; Harrison *v.* Lexington R. Co., 9 id. 470; Young *v.* Harrison, 6 Ga. 130; Selma R. Co. *v.* Tipton, 5 Ala. 805; Duke *v.* Cahawba Nav. Co., 16 id. 372; State *v.* Centerville Br. Co., 18 id. 678; Smith *v.* Plank Road Co., 30 id. 650; Bayless *v.* Orne, Freem. (Miss.) 173; Smith *v.* Mississippi R. Co., 6 S. & M. 179; Grand Gulf Bank *v.* Archer, 8 id. 151; Rex *v.* Slaverton, Yelv. 190; Rex *v.* Carmarthen, 1 W. Bl. 187; 2 Burr. 869; Rex *v.* Amery, 2 T. R. 515; Rex *v.* Pasmore, 3 id. 244; Terrett *v.* Taylor, 9 Cranch, 51; 2 Kent's Com. 313. Ang. & Am. on Corp., § 777; Green's Brice's Ultra Vires, 647 *et seq.*

People *v.* Kingston T. Co., 23 Wend. 193; People *v.* Phoenix Bank, 24 id. 431. And this doctrine of waiver does not apply where, by the express terms of the charter, the franchise absolutely determines on failure to perform certain conditions. People *v.* Manhattan Co., 9 Wend. 351; Commonwealth *v.* Union Ins. Co., 5 Mass. 232.

[1] Bank, etc., *v.* Wrenn, 3 S. & M. 791; Commercial Bank *v.* Lockwood, 2 Harr (Del.) 8; Ang. & Am. on Corp., § 778.

has no legal authority to exercise such powers.[1] But the modern proceeding in such cases is in the nature of quo warranto.[2] For, as we have before noticed, although the ancient writ of quo warranto was the method whereby legal inquiry was made, as to the authority of a body of persons assuming to act as a corporate body, to legally perform such functions,[3] information in the nature of quo warranto is a modern mode of correcting not only the usurpations, but the mis-user or non-user of a corporate franchise.[4] For various reasons the ancient proceedings in England, by writ, fell into disuse, and the modern remedy by information in the nature of quo warranto, was substituted.[5] Informations of this character may be filed by the attorney-general or the attorney representing the state, or by any other person, by leave of the court.

"The principle is now firmly established," observes Mr. High, "that the granting or withholding leave to file an information, at the instance of a private relator, to test the right to an office or franchise, rests in the sound discretion of the court to which the application is made, even though there be a substantial defect in the title by which the office or franchise is held.[6] In the exercise of this discretion, upon the application of a private relator, it is proper for the court to take into consideration the necessity and policy of allowing the proceedings, as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed merely to gratify a relator who has no interest in the subject of inquiry.[7] The court will also weigh

[1] See opinion of ASHURST, J., in Rex *v.* Pasmore, 3 T. R. 244; Regents, etc., *v.* Williams, 9 G. & J. 365; Ang. & Am. on Corp., ch. XXI; Green's Brice's Ultra Vires, 589.

[2] 1 Black. Com. 485; 2 Kyd on Corp. 474; *ante*, § 453; People *v.* Bank of Niagara, 6 Cow. 196; People *v.* Bank of Hudson, id. 217; Same *v.* Washington, etc., Bank, 211; 3 Black. Com. 262; Commonwealth *v.* Small, 26 Pa. St. 31; State *v.* Ashley, 1 Ark. 279.

[3] High on Extra. Leg. Rem., § 593 *et seq.*, and notes.

[4] Id., § 601 *et seq.*, and notes.

[5] See Id., § 591 *et seq.*, for a history of quo warranto, and of the proceeding by information in the nature thereof. See, also, 3 Black. Com. 263; Attorney-General *v.* Barstow, 4 Wis. 659.

[6] People *v.* Waite, Ill. (1874), Chic. Leg. News, 175; State *v.* Tolan, 4 Vroom, 195; State *v.* Schnierle, 5 Rich. 299; State *v.* Fisher, 28 Vt. 714; Commonwealth *v.* Reigart, 14 S. & R. 216; State *v.* Brown, 5 R. I. 1; See, also, Stone *v.* Wetmore, 44 Ga. 495; Commonwealth *v.* Cluley, 56 Pa. St. 270; People *v.* Sweeting, 2 Johns. 184. But see State *v.* Burnett, 2 Ala. 140.

[7] State *v.* Brown, 5 R. I. 1.

the considerations of public convenience involved, and will compare them with the injury complained of, in determining whether to grant or refuse the application."[1] It is not within the proper scope of this treatise to consider fully the various ordinary and extraordinary remedies, which may be had by and against corporations, or those related to them as stockholders and creditors. Special treatises are devoted to these matters, especially the common law remedies, by mandamus, quo warranto, injunction, etc., the general principles relating to which are as applicable to corporations as to individuals.[2]

SEC. 485. We have already noticed, that to warrant a judgment of forfeiture against a corporation on the ground of neglect or abuse of corporate powers, such neglect must be more than the result of mere omission to use certain powers possessed or a mere accident, and such abuse must be willful and not the result of mistake.[3] Thus, it is not a cause of forfeiture for a corporation

[1] High on Ex. Leg. Rem., § 605. See, also, State *v.* Schnierle, 5 Rich. 299.

"In former times," it is observed by Mr. Brice, "it was rather a common occurrence for proceedings to be instituted by the crown against corporations for misusing their franchises or against individuals for usurping such privileges. State reasons were generally the motive cause. The municipal corporations during the middle ages, and till a period at least as late as the Revolution of 1688, formed one of the main stays of English liberty. The sovereigns encouraged them as the centers of trade, and repressed them by every means, when they attempted to make subservient to political objects the great power which the union and periodical meetings of their members gave them. Other incentives there were, too, which prompted the almost continual interference of the crown with the corporations. Every addition to the importance and strength of them was assumed to be an encroachment upon and a diminution of the prerogative. Moreover, the fines imposed upon corporate bodies, and often upon the luckless corporators themselves, were a lucrative source of revenue. However, with the increase of individual freedom, and the protection for the expression of individual opinions, the political importance of these bodies has greatly diminished; consequently seldom, if ever, does the crown now attack them for an encroachment upon its own privileges, or for any other reason of offense to itself." Green's Brice's Ultra Vires, 649.

[2] See *ante*, ch. 18; also High. on Ex. Leg. Rem., tit. Mandamus and Quo Warranto; Tapping on Mandamus; High. on Injunctions; also, *post*, ch. 21, for a treatment of Mandamus.

[3] See *ante*, § 456.

A neglect to elect proper officers, or the death of officers, does not usually constitute a cause of dissolution. Vincennes Univ. *v.* Indiana, 14 How. 268; Russell *v.* McClellan, 14 Pick. 63; Knowlton *v.* Ackley, 8 Cush. 94; Evarts *v.* Killingworth Co., 20 Conn. 447; Philips *v.* Wickham, 1 Paige, 590; Rose *v.* Turnpike Co., 3 Watts, 46; Commonwealth *v.* Cullen, 13 Pa. St. 133; Blake *v.* Hinkle, 10 Yerg. 218; Nashville Bank *v.* Petway, 3 Humph. (Tenn.) 524; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. 140.

to neglect to enforce its rights against a delinquent stockholder by omitting to sell his shares of stock in the company, or to sue such stockholder for unpaid calls,[1] or for the refusal of an insurance company to insure in certain cases,[2] or for refusing to insure in any case, and discontinuing all ordinary business (except settling up its affairs) for the period of a year;[3] nor, generally, that proceedings have been instituted against the corporation under insolvent laws,[4] or that a receiver has been appointed.[5]

"In general, to work a forfeiture, there must be something wrong, arising from willful abuse or improper neglect; something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power. A single act of abuse or willful non-feasance in a corporation, may be insisted on as a ground of total forfeiture, but a specific act of *non-feasance*, not committed *willfully* or *negligently*, not producing nor having a tendency to produce mischievous consequences to any one, and not being contrary to any particular requisition of the charter, will not work a forfeiture."[6] Slight deviations from the provisions of a charter would not necessarily be either an abuse or mis-use of it and ground for its annullment, although it would be competent, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them.[7] The duties assigned by an act of incorporation are conditions annexed to the grant of the franchises conferred. Hence non-compliance with the requirements of an act incorporating a turnpike company as to the construction of the road is, *per se*, a

[1] Commercial Bank, etc., *v.* State of Miss., 6 S. & M. 615.

[2] State *v.* Urbana Ins. Co., 14 Ohio, 6. Acts of neglect do not work a dissolution *ipso facto*, but entitle a stockholder or creditor to take proceedings to have it judicially declared. Mickles *v.* Rochester City Bank, 11 Paige, 118.

[3] Jackson Marine Ins. Co., In the Matter of, 4 Sandf. Ch. 550.

[4] Coburn *v.* Boston Papier Maché Manuf. Co., 10 Gray, 243; Rollins *v.* Clay, 33 Me. 132; Brandon Iron Co. *v.* Gleason, 24 Vt. 228; State Nat. Bank *v.* Robadoux, 57 Mo. 446; Platt *v.* Archer, 9 Blatchf. 559; Boston Glass Manuf. *v.* Langdon, 24 Pick. 49; Coburn *v.* Boston Papier Maché Manuf. Co., 10 Gray, 243; Catlin *v.* Eagle Bank, 6 Conn. 233; Pondville Co. *v.* Clark, 25 id. 97; Hoyt *v.* Sheldon, 3 Bosw. 267; Nimmons *v.* Tappan, 2 Sweeney, 652. But see, under the National Banking Statutes, National Bank *v.* Colby, 21 Wall. 609.

[5] Taylor *v.* Franklin Ins. Co., 115 Mass. 278.

[6] People *v.* Bristol T. R., 23 Wend. 222; Bank Commissioners *v.* Bank, etc., 6 Paige, 497; Ward *v.* Sea Ins. Co., 7 id. 294; Paschall *v.* Whitsett, 11 Ala. 472; State *v.* Merchants' Ins. Co., 8 Humph. 235; Fredrick Female Seminary *v.* State, 9 Gill. 379; State *v.* Coll & H. P. R. Co., 2 Sneed, 254

[7] Eastern Archipelago Co. *v.* Reginam, 2 Ellis & B. 857; 22 Eng. L. & Eq. 338.

mis-user, subjecting the privileges and franchises of the company to forfeiture.[1]

Indeed the non-performance of a particular act required by the charter, whether for the benefit of an individual or the state, is, or may be, a cause of forfeiture, although not especially declared to be such by the charter itself.[2] The non-payment of the portion of the capital required by the charter for the beginning of business, and the sending in by the directors of a false certificate that it was paid and thereupon commencing business, is, as a breach of the conditions of the charter or an abuse of its franchises, cause of forfeiture.[3]

"A *substantial* performance of conditions, however, is all that is required whether they be conditions *precedent* or *subsequent*."[4]

SEC. 486. **Dissolution by the voluntary act of members.** — The doctrine that a private moneyed corporation may be dissolved by the voluntary action of a majority of its members, in the absence of positive provisions to the contrary, contained in the constating instruments, seems generally received in England. On this subject Mr. Brice says: "The majority of a corporation may, against the wishes of the minority, dissolve by winding up, and the more generally received opinion is, that they can do so by any other process which is purely voluntary."[5] And in this country the

[1] People *v.* Kingston T. Co., 23 Wend. 193. And see Lumbard *v.* Stearns, 4 Cush. 60; People *v.* Jackson T. Co., 9 Mich. 285.

[2] Attorney-Gen. *v.* Petersburg R. Co., 6 Ired. (N. C.) 456.

[3] Eastern Archipelago Co. *v.* Reginam, 2 Ellis & B. 857; 22 Eng. L. & Eq. 328; 13 Eng. L. & Eq. 167. Mr. Dillon expresses a belief that the doctrine of forfeiture in such cases has no application to municipal corporations. Dill. on Mun. Corp., § 112.

[4] People *v.* Thompson, 21 Wend. 235; S. C. in error, Thompson *v.* People, 23 id. 537; Commonwealth *v.* Allegheny Co., 20 Pa. St. 185. If a railroad corporation should suffer their road to be sold on execution, it would be cause of forfeiture. State *v.* Rives, 5 Ired. (N. C.) 309. But in Iowa it is provided: "The franchises of a corporation may be levied upon under execution and sold, but the corporation shall not become thereby dissolved, and no dissolution of the original corporation shall affect the franchise, and the purchaser becomes vested with all the powers of the corporation therefor." Code (1873), § 1086.

[5] Green's Brice's Ultra Vires, 651; Ward *v.* Society of Attornies, 2 Coll. 370; Bank of Switzerland *v.* Bank of Turkey, 5 L. T. (N. S.) 549.

In England it is now expressly provided by act of parliament (Companies Act, 1862, 25 & 26 Vict., c. 89, § 79), that a corporation may be wound up in the following cases:

1. Whenever the company has passed a special resolution requiring the company to be wound up by the court.

2. Whenever the company does not commence its business for the space of a whole year.

3. Whenever the members are reduced in number to less than seven.

right of a private corporation for pecuniary gain to voluntarily dissolve seems generally conceded, notwithstanding the charter constitutes a contract, to which there must necessarily be at least two parties and the assent of both parties is essential to the abrogation of the contract.[1]

But it has sometimes been held in this country that such voluntary surrender must, in order to be effective, be accepted by the state.[2] In some cases surrender has been presumed merely from the neglect to use the corporate powers;[3] and in others that neither non-user, suspension of business, nor the sale or assignment of the corporate property, will necessarily constitute a surrender of the corporate franchises.[4] But acts which destroy the end for which the corporation was created have been held to be a surrender of its corporate rights and powers.[5] And it is evident that such conduct on the part of the corporation would be ultra vires, and be just ground for a judgment of forfeiture against it. In this country it has been held that corporations for pecuniary gain may, by a vote of the majority of its members, wind up their affairs; or they may sell the whole of

4. Whenever the company is unable to pay its debts.
5. Whenever the court is of opinion that it is just and equitable that it should be wound up.

[1] Riddle v. Locks, etc., Co., 7 Mass. 185; Hampshire v. Franklin, 16 id. 86; Savage v. Walshe, 26 Ala. 619; Mobile, etc., R. Co. v. State, 29 id. 573; 2 Kent's Com. 310; Mumma v. Potomac Co., 8 Pet. 281; Penobscot Boom Co. v Lamson, 16 Me. 224; Hodsdon v. Copeland, 16 id. 314; Enfield Toll Br. Co. v. Connecticut, etc., R. Co., 7 Conn. 45; Slee v. Boom, 19 Johns. 456; McLaren v. Pennington, 1 Paige, 107; Canal Co. v. Railroad Co., 4 G. & J. 1; Attorney-Gen. v. Clergy Soc., 10 Rich. Eq. 604; McIntire v. Zanesville Canal Co., 9 Ohio, 203; 1 Kyd on Corp. 1, 9, 10; Rex v. Amery, 2 T. R. 531; Rex v. Gray, 8 Mod. 361.

[2] Revere v. Boston Copper Co., 15 Pick. 351; Boston Glass Co. v. Langdon, 24 id. 49; Enfield Toll Br. Co. v. Connecticut, etc., R. Co., 7 Conn. 45.

[3] Brandon Iron Co. v. Gleason, 24 Vt. 228; Brinkerhoff v. Brown, 7 Johns. Ch. 217; Barclay v. Talman, 4 Edw. Ch. 123; People v. Bank of Hudson, 6 Cow. 217; Bradt v. Benedict, 17 N. Y. 93; State v. Bank of Md., 6 G. & J. 205; University of Md. v. Williams, 9 id. 365; Town v. Bank of River Raisin, 2 Doug. (Mich.) 541; Bruffett v. Great Western R. Co., 25 Ill. 353.

[4] Id.; Penobscot Boom Co. v. Lamson, 16 Me. 224; Brandon Iron Co. v. Gleason, 24 Vt. 228; Newton, etc., Co. v. White, 42 Ga. 148.

[5] Strickland v. Prichard, 37 Vt. 324; Slee v. Bloom, 19 Johns. 456; Penniman v. Briggs, 1 Hopk. 300; S. C., 8 Cow. 387; People v. Hudson, 6 id. 217; Moore v. Whitcomb, 48 Mo. 543. Mr. Dillon observes in relation to municipal corporations: "Since all our charters of incorporation come from the legislature, there can be no dissolution of a municipal corporation by a surrender of its franchise * * * If there could be any such thing, it would, from necessity, have to be made to the legislature, and its acceptance would have to be manifested by appropriate legislation." Dill. on Mun. Corp., § 111.

their property to a new corporation and take shares of its stock in payment, to be distributed among the members of the old company who are willing to take them.[1] And under an existing statute of Massachusetts a majority of members, or those representing a majority of shares, may, by application to the supreme court, setting forth reasonable grounds therefor, secure a dissolution of the corporation.[2]

SEC. 487. **When the majority may surrender the franchise.** — The question as to the unanimity required by the corporators in order to accomplish a voluntary surrender of corporate franchises may depend upon the provisions of the charter. If there is no provision upon this subject, and no definite period of limitation to corporate existence, it has been uniformly held that a majority may, by resolution, surrender its charter;[3] but if it is otherwise provided in the constating instruments, or if the duration of the corporation is fixed by them, unanimity of the stockholders is held essential to a surrender.[4]

[1] Wilson *v.* Central Br. Co., 9 R. I. 590; Treadwell *v.* Salisbury Man. Co., 7 Gray, 393; Ang. & Am. on Corp., § 772.

[2] Gen. Stat. Mass., ch. 68, § 35. See, also, Stat. 1852, ch. 55; Pratt *v.* Jewett, 9 Gray, 34. The Code of Iowa, § 1066 (1873), provides: "No corporation shall be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles." A private corporation may surrender its franchise. The People *v.* The President, etc., of the College of California, 38 Cal. 166; 1 With. Corp. Cas. 161.

[3] See authorities already cited on the question. See, also, Treadwell *v.* Salisbury Man. Co., 7 Gray, 393; Wilson *v.* Proprietors, etc., 9 R. I. 590; Zabriskie *v.* Hackensack R. Co., 3 C. E. Green, 193; Black *v.* Delaware, etc., Canal Co., 7 id. 404; McCurdy *v.* Myers, 44 Pa. St. 435. But see Kean *v.* Johnston, 1 Stockt. 401; Revere *v.* Boston Cop. Co., 15 Pick. 351; Curien *v.* Santini, 16 La. Ann. 27; Polar Star Lodge *v.* Polar Star Lodge, id. 53.

[4] Von Schmidt *v.* Huntington, 1 Cal. 55.

Chancellor ZABRISKIE, in Black *v.* Delaware, etc., Canal Co., *supra*, observes: "But there is no case that holds that a majority of corporators, where a time is not specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company. * * * Becoming incorporated for a specified object without any specified time for the continuance of the business is no contract to continue it forever any more than articles of partnership without stipulations as to time."

Corporations cannot be compelled to use their powers where their interests will not be subserved thereby. People *v.* Albany, etc., R. Co., 24 N. Y. 261; Treadwell *v.* Salisbury Man. Co., 7 Gray, 393.

And provision is frequently made by statute that, in case of dissolution either by expiration of the time fixed by law or by the voluntary act of the stockholders, corporate functions continue for the purpose of winding up the corporate concerns. Iowa Code (1873), § 1080.

In Revere *v.* The Boston Copper Co., 15 Pick. 351, the defendant had made

SEC. 488. **Dissolution under statutes providing for the winding-up of corporations.** — There are, perhaps, generally, statutory provisions

a contract with the plaintiff to serve its interests during life, and promised in consideration thereof the payment of a fixed salary so long as the services continued to be faithfully performed. The court say: "The defendant corporation was established by the legislature in February, 1825, and about a month after its incorporation made the contract on which the question arises.

"That agreement was made in March 15, 1825, and the cause depends upon its construction. It purports to be a mutual agreement between the corporation on the one part and the plaintiff and another individual on the other part.

"It is contended by the defendants that by the proceedings stated in the case this corporation was dissolved and determined, and so by the limitation in the contract itself the term for which the plaintiff was engaged had ceased.

"Without determining whether such a voluntary dissolution of the corporation was the event contemplated by the parties in the clause alluded to, we are of the opinion that by the acts disclosed this corporation was not dissolved.

"By a reference to the act of incorporation, St. 1824, ch. 61, amended as to the name by St. 1825, ch. 124, it appears, that the company was not incorporated for any determinate time, and was, therefore, in its nature, perpetual. We think such a corporation cannot dissolve itself, and terminate its own existence, at its own will, by a bare notice to the executive department of the government.

"It may be asked, then, what could have been contemplated by the clause in the contract, limiting the term of the plaintiff's engagement, to the time for which the corporation was established; or how a corporation not limited in its duration can be dissolved and terminated. I suppose no reasonable doubt can exist, that the power to create, by the consent of parties, may, with the like consent, dissolve a corporation. An act of incorporation is deemed to be a contract, between its members and the sovereign, formed by the consent of both parties: and it is conformable to the spirit of the law of contract, that, with the like consent, it may be abrogated and discharged, and, therefore, it would be competent for the legislature, by a formal act, to accept such a surrender, and thereupon dissolve the corporation. This would afford a security to the public and to all those who might have an interest in the concerns of such corporation, that no dissolution would be sanctioned by the legislature, which would, in its consequences, impair their rights.

"But there is another circumstance which may be deemed sufficient to give a meaning and effect to this part of the agreement.

"Although this act of incorporation had no provision limiting its duration to any certain time, yet it was made subject in all respects to the provisions of the general act regulating manufacturing corporations (St. 1808, ch. 65, § 7), by which it is provided, that the legislature shall have power, at any time afterward, to modify or wholly repeal any act of incorporation thereafterward to be made. This provision is, therefore, substantially embodied into the act of incorporation and made part of it. In consequence of this provision, the act was in effect held at the pleasure of the legislature, and had they passed an act, repealing it after a certain time, the period thus limited would determine the time for which it was incorporated, and fix a limit to the term of the plaintiff's engagement. But as no such act was passed, and no act was done which in our opinion would dissolve the corporation, the time for which the plaintiff engaged, has not been limited or fixed by the clause in question. The question then recurs, upon the construction and legal effect of this contract.

"The first and fundamental rule in the construction of a contract is to ascertain the meaning and intent of the parties; and the second is to look at every clause and word of the instrument in which they have embodied their contract, to ascertain that meaning.

"The engagement of the plaintiff to

in the various states, for the dissolution of corporations and the winding-up of their affairs by proceedings in court. These frequently provide when, for what causes, and in what mode corpo-

perform services, being for the time for which the corporation was established, when applied to a corporation, constituted as already stated, is for an indefinite time, determinable by the dissolution of the corporation in a mode fixed by law. The stipulation of the corporation is to pay the salaries to the plaintiff and the other individual, so long as they shall continue to perform their part of this agreement. They, without any further provision, must render the contract determinable by the death of the plaintiff, or by any failure to perform his part of the contract. But this is not left to inference. The next and last clause provides that, in case of the death or refusal to perform the agreement of the said Revere, or other individual, the corporation is to be discharged from all obligation except to the survivor or party continuing to perform. This clause, to my mind, carries a necessary implication that, until the death of the plaintiff or his refusal to perform his agreement, the corporation is not discharged, but the obligation to pay continues, and further, that upon the death or refusal to perform of one, the obligation of the corporation is to continue as to the other. This makes it essentially a contract with each, for life. For although this term is not used, yet a contract with a corporation, which is in its nature perpetual, but determinable by some contingent event, is a contract for an indefinite time, and a stipulation by the corporation to pay so long as the other party shall perform, with a proviso that, by the death of the party contracting to perform services, the corporation shall be discharged, is in legal effect a contract for life. Such, it appears to the court, was the contract in the present case.

"In opposition to this view, it is contended, in the able argument for the defendants, that this could not have been the meaning and intent of the parties, because it would be unequal; in case of the ill success of the contemplated enterprise, injurious and ruinous to the company; and as the obvious intent and expectation of the company, of whom the plaintiff was one, was to carry on a useful, and successful, and profitable business, the contract must be taken to have been made with the necessary limitation, that, if the business proved unprofitable, the defendants must be at liberty to bring it to a close, that should terminate their obligation to employ and pay the plaintiff for services. They contend, that the parties contemplated, not the legal dissolution of the corporation, but the determination of its business existence, and this they had a right to determine whenever they should find the enterprise unsuccessful, after a full and fair trial, and should in good faith for that cause judge it expedient to bring its business to a close.

"These views would certainly deserve great consideration, and a more thorough investigation, if the terms of the contract were doubtful or ambiguous, and if it were open to construction. But if the terms of the contract are plain and perspicuous, it is not enough to say, that the parties could not have intended what their language has plainly expressed. The bargain may have been hasty or improvident, or one of which we cannot see the reasons or ground. Still, if such was the contract, and entered into fairly, it is not for a court of law to vary or alter it, or change its legal effect, upon vague notions of improvidence or inequality, or on account of its being founded upon expectations which have not been realized. But, although in the result it may have proved unprofitable to the corporation, the court cannot perceive that it was unequal as between the parties. It is to be presumed that the plaintiff had skill and experience in his business, and was so considered by the company. They require him to stipulate that he will devote the whole of his time, skill, and attention to their business for his life, and will engage in no other business. The court are not informed what business the plaintiff and Blake were in before, what good-

SEC. 490. **Dissolution by the death of all the members.** — It is a recognized common-law doctrine that private corporations become

may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable, offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the comptroller of the currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

"Sec. 5227. On receiving notice that any national banking association has failed to redeem its circulating notes, as specified in the preceding section, the comptroller of the currency, with the concurrence of the secretary of the treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes, and if in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

"Sec. 5228. After default on the part of an association to pay any of its circulating notes has been ascertained by the comptroller, and notice of forfeiture of the bonds has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any of its bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and deliver special deposits.

"Sec. 5229. Immediately upon declaring the bonds of an association forfeited for the non-payment of its notes, the comptroller shall give notice, in such manner as the secretary of the treasury shall, by general rules, or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the treasury of the United States; whereupon the comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

"Sec. 5230. Whenever the comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to re-imburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets, and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

"Sec. 5231. The comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale, and no sales of any such bonds, either public

dissolved, *ipso facto*, by the loss of all their members by death. "A corporation," observes Mr. Brice, "perishes whether the whole of its members have died out, or the whole of those who constitute an integral essential part, provided there is no means of repairing the breach." [1]

The doctrine of dissolution in case of a destruction of an integral part has little, if any, application to private corporations for pecuniary gain as created under general statutes in this country. It has been justly observed in reference to them, that "the stockholders compose the company, and the managers, or directors and officers, are their agents, necessary for the management of the affairs of the company, but not essential to its existence as such, and not forming an integral part. The corporation exists *per se* so far as it is requisite to the maintenance of perpetual succession and the holding and preserving of its franchises. The non-existence of the managers does not suppose the non-existence of the corporation. The latter may be dormant; its functions may be suspended for want of the means of action, but the capacity to restore its functionaries by means of new elections remain. When, therefore, the election of its managers, directors or other officers, is by charter to be conducted solely by the stockholders, the charter or act of incorporation not requiring the managers, directors or other officers to preside at or do any act in relation to the election, a failure to elect such officers on the charter day will not dissolve the corporation, but the election may take place on the next charter day without any new legislative aid." [2]

or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four." Rev. Stat., U. S., 1874.

[1] Green's Brice's Ultra Vires, 655, 656; Ang. & Am. on Corp., §§ 768, 769, 770, and notes.

[2] Green's Brice's Ultra Vires, 655, 656; citing Rex *v.* Morris, 4 East, 17. See, also, American authorities: Penobscot Boom Co. *v.* Lamson, 16 Me. 224; Boston Glass Man. Co. *v.* Laugdon, 24 Pick. 52; Ang. & Am. on Corp., § 768, 777, and notes; Phillips *v.* Wickham, 1 Paige, 596; Canal Co. *v.* Railroad Co., 4 G. & J. 1; McIntire Poor School *v.* Zanesville C. Co., 9 Ohio, 203.

[3] Ang. & Am. on Corp., § 771. See, also, Rose *v.* Turnpike Co., 3 Watts, 46; Wier *v.* Bush, 4 Little, 433; Nashville Bank *v.* Petway, 3 Humph. 524; Smith *v.* Natchez Samb. Co., 2 How. (Miss.) 478; Phillips *v.* Wickham, 1 Paige, 590; Evarts *v.* Killingworth Man. Co., 20 Conn. 447; Commonwealth *v.* Cullen, 13 Pa. St. 133; Lowber *v.*

The death of all the members can hardly be possible with a joint-stock corporation, as the stock would on the decease of the owner be represented by and vested in some one who would become a member of the corporation by virtue of such stock, and entitled to all the rights and privileges of such former member.

SEC. 491. **Effect of dissolution generally at common law.**—According to the common law a corporation of any kind that was dissolved, or ceased as such to exist for any cause, was considered as civilly dead, and could no more act by its agents or otherwise than a natural person under the same circumstances. The result, too, of such civil death by the ancient common law, was that all lands held by it at the time reverted to the grantor or his heirs, as it was held to be a condition implied in all grants to corporations that if for any cause the grant failed, by death or otherwise, the lands granted should revert;[1] and debts due to or from it were extinguished, as there were no heirs or representatives of a corporation. Leases were rendered void because of the reversion of the lands;[2] lands held in trust for charitable purposes were lost; suits pending by or against it were abated; and the personal property became vested in the king,[3] and, in this country, in the people.[4]

"These consequences of the dissolution of a corporation," observes Mr. Dillon, "attached to all corporations, eleemosynary, municipal, and private; and since this doctrine has, in this country, been generally rejected as to private corporations organized for pecuniary profit, and rests upon no foundation in reason or

New York, 5 Abb. Pr. 325; Clarke *v.* City of Rochester, id. 107; Russell *v.* McLellan, 14 Pick. 63; Knowlton *v.* Ackley, 8 Cush. 94; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 140. Mr. Dillon observes: "In this respect [the failure to elect officers] municipal corporations resemble ordinary private corporations which exist *per se*, and consist of the stockholders who compose the company. The officers are their agents or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation." Dill. on Mun. Corp., § 110; People *v.* Fairbury, 51 Ill. 149.

[1] Co. Litt. 13 b., 102 b.; Knight *v.* Wells, 1 Sut. 519; Rex *v.* Pasmore, 3 T. R. 199; White *v.* Campbell, 5 Humph. 38; Bingham *v.* Weiderwax, 1 Comst. 509; 2 Kyd on Corp. 516; 2 Kent's Com. 307; 4 Black. Com. 484.

[2] Ang. & Am. on Corp., § 779; citing Greeley *v.* Smith, 3 Story, 657; Merrill *v.* Suffolk Bank, 31 Me. 57; Ingraham *v.* Terry, 11 Humph. 572; Saltmarsh *v.* Planters' Bank, 17 Ala. 761; Contra, Lindell *v.* Benton, 6 Mo. 361.

[3] Id. Ang. & Am. on Corp., § 195.

[4] 2 Kent's Com. 307.

justice, it may perhaps be safely affirmed that it would not, on full consideration, be applied to the dissolution of a municipal corporation by an absolute and unconditional repeal of its charter, or (if that may be done) to the case where the charter of such corporation is forfeited by judicial sentence."[1] If, in the case of municipal corporations, a court of chancery will treat the corporate assets as a trust fund, in case of the dissolution of a corporation by legislative action, and will assume the execution of the trust, or see that it is properly executed, as has been noticed,[2] the same rule ought to prevail in cases of private corporations for pecuniary gain. And the tendency of recent opinions seems to support this view; and to sustain the doctrine that the surplus assets, after the satisfaction of the claims of creditors and the payment of expenses, even in the absence of statutory provisions on the subject, belong to the stockholders; that lands conveyed to such a corporation for a full consideration in fee do not revert to the grantor; and that the doctrine of the old common law, in such cases as to reversion and forfeiture of the corporate property, if applicable at all, is not applicable to private corporations for pecuniary emolument.[3]

[1] Dill. on Mun. Corp., § 118; citing Bacon *v.* Robertson, 18 How. (U. S.) 480; Girard *v.* Philadelphia, 7 Wall. 1; Mumma *v.* Potomac Company, 8 Pet. 281; Curran *v.* Arkansas, 15 How. (U. S.) 312; 2 Kent's Com. 307, note; Ang. & Am. on Corp., 779 a.; Coulter *v.* Robertson, 24 Miss. 278; County Commissioners *v.* Cox, 6 Ind. 403; State *v.* Trustees, etc., 5 id. 77; Vincennes University *v.* Indiana, 14 How. 268; Owen *v.* Smith, 31 Barb. 641; Commonwealth *v.* Roxbury, 9 Gray, 510, note.

[2] Girard *v.* Philadelphia, 7 Wall. 1; Montpelier *v.* East Montpelier, 29 Vt. 12; 27 id. 74.

[3] Bacon *v.* Robertson, 18 How. 480, in which Mr. Justice CAMPBELL observes: "The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation, whose charter had been forfeited by judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of public or ecclesiastical corporations by the exertion of public authority, or as a consequence of the death of their members, and parliament, and the courts had affirmed, in these instances, that the endowments they had received from the prince of pious founders would revert in such a case." See, also, Stat. *de terris Templariorum*, 17 Edw. II.; Dean and Canons of Windsor, Godb. 211; Johnson *v.* Norway, Winch. 37; Owen, 73; 6 Vin. Abr. 280. Mr. Green, in his note to Brice's Ultra Vires, p. 85, observes: "Modern legislation has modified the odious rule of the common law, that upon the dissolution of a corporation, its remaining real estate unsold reverts to the grantor and his heirs (see Ang. & Ames on Corporations, §§ 179, 195), and the courts in similar spirit hold that where a corporation is authorized to acquire a fee simple to lands belonging to private persons, for public use, and such acquisition is had and compensation accepted, no reversionary estate remains,

SEC. 492. **Effect of dissolution upon creditors.** — Can the legislature, by a repeal of the charter of a private corporation, under authority so to do, affect the rights of creditors of such corporation?[1] The modern doctrine on this question is, that the dissolution either by legislative act or by judicial sentence cannot impair the obligations of a contract between the corporation and its creditors, any more than the death of a private and natural person can affect his contracts with others. "This doctrine," observes Mr. Dillon, "is based upon two grounds: First. The obligation survives, and the creditors may enforce their claims against the property belonging to the corporation which has not passed into the hands of *bona fide* purchasers. Second. Every creditor is presumed to contract with reference to a possibility of a dissolution of the corporate body." The former common-law doctrine in reference to the disastrous effects of a dissolution, and the civil death of a corporation, has been the subject of just criticism; and it is doubtful if it would now be applied to any class of corporations.[2] The doctrine now, as we have frequently observed, is, that the property and assets of a corporation are held in trust. First. For the payment of creditors. Secondly. For divis-

but the property may be used for any purpose, or may be disposed of by the corporation." Citing Heyward *v.* Mayor, 7 N. Y. 314; Rexford *v.* Knight, 11 id. 308; Brooklyn Park Com. *v.* Armstrong, 3 Lans. 429; S. C., 45 N. Y. 234; Dingley *v.* City of Boston, 100 Mass. 544; DeVaraigne *v.* Fox. 2 Blatchf. 95, Commonwealth *v.* Fisher, 1 P. & W. 462; Plitt *v.* Cox, 43 Pa. St. 486; Haldeman *v.* Penn. R. Co., 50 id. 425.

[1] Dill. on Mun. Corp., § 115, note 1; citing Mumma *v.* Potomac Company, (holding that on *sci. fa.* a judgment could not be revived, or costs adjudged, against a corporation legislatively annulled), 8 Pet. (U. S.), 281, 1834. In the case of Port Gibson *v.* Moore, 13 Sm. & Marsh. 157 (1849), it was held, indeed, that the repeal of the charter of an indebted municipal corporation dissolved it; that such dissolution extinguished debts to and from the corporation; and that a subsequent act re-incorporating the place did not make it liable for a debt existing anterior to the act repealing its charter. The court overlooked the constitutional provision protecting contracts, and the case as to the effect of a dissolution upon the rights of creditors seems to conflict with those above cited. See, further, as to extinguishment of debts by dissolution of corporation, Malloy *v.* Mallett, 6 Jones' Eq. 345; Hopkins *v.* Whitesides, 1 Head (Tenn.), 31; Bank *v.* Lockwood, 2 Harr. (Del.) 8; Robinson *v.* Lane, 19 Ga. 337; Muscatine Turn Verein *v.* Funck, 18 Ia. 469; Owen *v.* Smith, 31 Barb. 641; Welch *v.* Ste. Genevieve, 1 Dill. (C. C.) 130.

[2] Id. See, also, James *v.* Woodruff, 2 Den. 574; Tinkham *v.* Borst, 31 Barb. 407; Butterworth *v.* O'Brien, 24 How. Pr. 438; Adler *v.* Milwaukee, etc., Co., 13 Wis. 57; Lum *v.* Robertson, 6 Wall. 277; New Albany *v.* Burke, 11 id. 96; Burke *v.* Smith, 16 id. 390; Sawyer *v.* Hoag, 17 id. 610; State *v.* Bailey, 16 Ind. 46; Bacon *v.* Robertson, 18 How. 480; Curran *v.* State of Arkansas, 15 id. 312.

ion among the stockholders.[1] This right of creditors and stockholders is based not only upon natural justice and manifest equity, but it has recently been held that it is protected by the provisions of the constitution of the United States.[2] And it may be observed, generally, that in case of a lawful contract, resting upon authority conferred by statute, the repeal of such statute in a lawful manner could not affect the validity of such contract. If such contracts are legal when made, they could not be affected by such a repeal.[3] And this doctrine has application to contracts entered into by private corporations, by virtue of authority vested in them, and the corporations are subsequently dissolved by the legislature, by a repeal of the charter, or other revocation of the franchise conferred, where authority for this purpose is reserved in such legislature.

SEC. 493. **Forfeiture not the subject of collateral inquiry.** — The general doctrine is, that grounds of forfeiture or for dissolution of a corporation cannot be shown in a collateral proceeding. The question as to the right to exercise corporate functions, or to continue the use of corporate powers, is generally held to be one in which the state only is interested; and that she may waive the right of forfeiture; and if proceedings are had to determine this particular question, they must be instituted by the legal officer of the state, or, if by another person, leave of court is usually required, as we have seen; and that this is granted only on a showing of facts, which authorize such proceeding. But the mode of

[1] See *ante*, ch. 19. For additional authorities see Lum *v.* Robertson, 6 Wall. 277; New Albany *v.* Burke, 11 id. 96; Burke *v.* Smith, 16 id. 390; State *v.* Bailey, 16 Ind. 46; Bank of Salem *v.* Caldwell, id. 469.

[2] Curran *v.* State of Arkansas, 15 How. 312; 2 Kent's Com. 307, note *a*; Hightower *v.* Thornton, 8 Ga. 486; Bacon *v.* Robertson, 18 id. 480; Lum *v.* Robertson, 7 Wall. 277; New Albany *v.* Burke, 11 id. 96; Burke *v.* Smith, 16 Ind. 390. See, also, Salem *v.* Caldwell, 17 id. 469, where it was held that a subscriber to an insurance company could not, in a suit by an assignee on his subscription note, offset a claim against the company purchased by him.

[3] Dill. on Mun. Corp., §§ 41, 114; Van Hoffman *v.* Quincy, 4 Wall. 535; Woodruff *v.* Trapnall, 10 How. 206; Lansing *v.* County Tr., 1 Dill. (C. C.) 522; Muscatine *v.* Railroad Co., id. 536; Soutter *v.* Madison, 15 Wis. 30; Western Sav. Bank *v.* Philadelphia, 31 Pa. St. 175; Cooley on Const. Lim. 200, 202; Curran *v.* Arkansas, 15 How. 312; Bacon *v.* Robertson, 18 id. 480; Coulter *v.* Robertson, 24 Miss. 278; Gelpcke *v.* Dubuque, 1 Wall. 175; Welch *v.* Ste. Genevieve, 1 Dill. (C. C.) 130; Smith *v.* Appleton, 19 Wis. 468; Blake *v.* Railroad Co., 39 N. H. 435; 2 Kent's Com. 307.

proceeding in such cases is usually a matter of statutory regulation. If a party contracts with a corporation, in the absence of fraud or bad faith in the matter, he is usually estopped from denying its legal existence.[1]

SEC. 494. **When corporate existence may be inquired into collaterally.** In certain cases, however, it has been held that the corporate existence may be inquired into in a collateral proceeding. Thus, in a proceeding in chancery against a corporation, to set aside a conveyance of real estate, alleged to have been obtained by the fraud and misrepresentation of the company, in relation to its existence as a corporation, it has been held that the fact whether or not the company ever had a corporate existence, so to enable it to take and hold property, may be inquired into; and that, if a company professing a corporate existence which it does not possess, fraudulently acquires for a particular purpose, the property of another, and conveys the same, the sufficiency of such conveyance or transfer may be inquired into collaterally. And that, if a corporation by its own acts has ceased to exist, or has suffered or permitted acts which destroy its existence, it is as fully and entirely dissolved, as if declared so to be by the judgment of a competent court; that where a corporation has ceased to have an existence as a legal and necessary consequence of certain acts, and a party claims that he has been injured thereby, or that certain benefits result to him therefrom, he may have his remedy without first instituting direct legal proceedings to have the corporation declared dissolved by the court.[2]

[1] Wood v. Coosa, etc., R. Co., 32 Ga. 273; Bank of Mo. v. Snelling, 35 Mo. 190; State v. Fourth New Hampshire Turnp. Co., 15 N. H. 162; S. P., Peirce v. Somersworth, 10 id. 369; Mechanics' Building Assoc. v. Stevens, 5 Duer, 676; Duke v. Cahawba Nav. Co., 16 Ala. 372; Pearce v. Olney, 20 Conn. 544; Young v. Harrison, 6 Ga. 130; Baker v. Backus, 32 Ill. 79; Wilmans v. Bank of Ill., 6 Ill. 667; Brookville, etc., Co. v. McCarty, 8 Ind. 392; Stoops v. Greensburgh Plank R. Co., 10 id. 47; Bank of Galliopolis v. Trimble, 6 B. Monr. 599; Bank of Mo. v. Merchants' Bank, 10 Mo. 132; Johnson v. Bentley, 16 Ohio, 97; Planters' Bank v. Bank of Alexandria, 10 G. & J. 346; Hamilton v. Annapolis, etc., R. Co., 1 Md. Ch. 107; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. 124; Sewall's Falls Bridge v. Fisk, 23 N. H., 171; Towar v. Hale, 46 Barb. 361; McConahy v. Centre Turnp. Co., 1 Pa. 426; 16 S. & R. 140; Dyer v. Walker, 40 Pa. St. 157; Crump v. U. S. Mining Co., 7 Gratt. 352; Arthur v. Commercial Bank, 17 Miss. 394; Bohannon v. Binns, 31 id. 355.

[2] Carey v. The Cincinnati, etc., R. Co., 5 Ia. 357. See, also, Phillips v. Wickham, 1 Paige, 595; Briggs v. Penniman, 8 Cow. 387; Canal Co. v. Railroad Co., 4 G. & J., 1; Slee v. Bloom, 19 Johns. 456; 2 Kyd on Corp. 467;

King *v.* Passmore, 3 T. R. 244; 1 Rolle's Abr. 514; 4 Com. Dig. 273. In the case first above cited the court say: "It is true that it may not, and cannot thus relieve itself (by merger in a new organization), or perhaps the corporators individually, from responsibility to those to whom it or they may be indebted, but it may by the act become so situated as to be estopped from claiming that it remains undissolved." But see Anderson *v.* Newcastle R. Co., 12 Ind. 376; Barrett *v.* Mead, 10 Allen, 337.

CHAPTER XXI.

MANDAMUS.

SEC. 496. **The writ, its functions.**—A writ of mandamus was, at common law, a prerogative writ, issuing from the court of Queen's Bench, in which, by a fiction of law, the sovereign was considered to be personally present. It commanded a duty to be performed, and was instituted to prevent a failure of justice, as where the law enjoined a duty upon a corporation or a corporate officer, in the performance of which the party claiming the writ was interested, and by the non-performance of which he would be injured, and where the law furnished no other specific or adequate remedy; in which case the writ might be obtained, commanding the party, in the name of the sovereign authority, to perform the duty required by law and particularly pointed out in the writ.[1]

SEC. 497. **The writ in this country.**—The early practice, at common law, relating to this writ and its return, has been considerably changed and regulated by statutory provisions; but where it is regulated by statute the general principles of the common law

[1] Add. on Torts (Wood's Ed.), § 1505; Reg. v. Chichester, etc., 29 L. J., Q. B. 23; Briggs, *ex parte*, 28 id. 272; Rex v. Barker, 3 Burr, 1265; Rex v. Norwich, etc., 1 Str. 55; Reg. v. Powell, 1 Q. B. 360; Rex v. Curghey, 2 Burr, 782; Reg. v. Hereford, 2 Salk. 701.

relating to it are usually retained. The remedy under statutes can, generally, only be resorted to, as at common law, to prevent a failure of justice, as where there is no other adequate legal remedy, to enforce the performance of the duty, in the performance of which the complaining party is interested.[1]

The writ is issued in the name of the sovereign authority and as will be shown more particularly hereafter, on an application made therefor, under oath, by petition or declaration, setting forth the facts that entitle the party to the writ. All the original advantages and benefits of the writ, as a remedy at common law, are usually provided for by statute; and it issues as a command from sovereign authority.[2]

SEC. 498. **When issued; discretion of the court.**—At common law the writ was not a matter of absolute right, but was only issued at the discretion of the court. Such is still the general doctrine, or at least, even under statutory provisions, the issuing of it rests, in a measure, in the discretion of the court. In order to entitle a party to the writ, it must appear that there is a right to demand it; and especially that there is no other adequate or specific remedy. But if a party shows himself entitled to it, it would be an error for the court to refuse it, which would be corrected on appeal. If, however, it does not appear that the claimant has a legal right to the remedy, it should not be granted; nor should it be granted by consent, if there is reason to believe that there has been a collusion between the parties to secure it.[3]

SEC. 499. **Practice and proceedings.**—The earlier practice to secure the benefit of this remedy was by motion based upon affidavit, for an order to show cause why the writ should not issue. The

[1] Arrington *v.* Van Houton, 44 Ala. 284; Reading *v.* Commissioners, 11 Pa. St. 196; People *v.* Thompson, 25 Barb. (N. Y.) 75; Fitch *v.* McDiarmid, 26 Ark. 482; State *v.* McCrillus, 4 Kans. 250.

[2] Commonwealth *v.* Dennison, 24 How. (U. S.) 66; *Ex parte* Conway, 4 Ark. 302; Arberry *v.* Beavers, 6 Tex. 457; Gilman *v.* Bassett, 33 Conn. 298; Kendall *v.* The United States, 12 Pet. 527. But in New York and Illinois it has been held to retain its prerogative character. People *v.* Board of Met. Police, 26 N. Y. 316; School Inspectors *v.* The People, 20 Ill. 530; The People *v.* Hatch, 33 id. 134; City of Ottawa *v.* The People, 48 id. 240.

[3] State *v.* Burbank, 22 La. Ann. 379; Parker *v.* Anderson, 2 P. & H. (Va.) 38; People *v.* Supervisors, 12 Barb. 217; Trustees *v.* State, 11 Ind. 205.

See, also, Arrington *v.* Van Houton, 44 Ala. 284; Reading *v.* Commissioners, 11 Pa. St. 196; People *v.* Thompson, 25 Barb. 73; Fitch *v.* McDiarmid, 26 Ark. 482; McBane *v.* The People, 50 Ill. 503.

hearing on the motion was usually *ex parte*, and without any notice to the party against whom it was sought. The order, if allowed, was served upon the defendant or respondent, and required him to appeal at a certain time and show cause against the issuing of the writ, at which time the respondent had an opportunity to be heard, and to controvert the relator's statements by counter affidavits.

The general American practice is to file a petition or complaint, under oath, in the manner of commencing a common suit, asking for the writ, and in which, as at common law, the plaintiff must aver facts sufficient to entitle him to the writ. These may be controverted by the defendant.

The proceeding is in many states like an ordinary civil action, the process only issuing after a hearing of the case and a judgment of the court to that effect; but it is, perhaps, usually provided by statute that the court or judge may make such temporary orders as may be necessary to protect the rights of the plaintiff until the case is finally decided. The practice, however, varies under the statutes of the different states. In some, the practice is to grant an alternative writ on an *ex parte* hearing, if a *prima facie* case therefor is made out, in which case the alternative writ stands in the place of a petition or declaration under the other practice; and in either case they would be subject to a motion to quash, or a demurrer, according to the practice in those respects prevailing in the different states.[1]

SEC. 500. **Office of the writ, to compel the performance of duty.**— It may be affirmed as a principle universally recognized, that the proper office and function of the writ is only to compel the performance of duties that are manifest. Where there is a discretion vested in an individual, officer, or corporation, as to the mode or manner of acting in the performance of a duty imposed by law, the writ cannot be obtained to interfere with that discretion, although it may require it to be exercised.[2]

[1] Moses on Mand. 203.

[2] Appling v. Bailey, 44 Ala. 333; Livingston v. Dorgenois, 7 Cran. (U. S.) 577; *Ex parte* Crane, 5 Pet. (U. S.) 190; Matter of Nabor, 7 Ala. 459; Dixon v. Feild, 10 Ark. 243; Manor v. McCall, 5 Ga. 522; Weeden v. Town Council, 9 R. I. 128; Mayor v. Rainwater, 47 Miss. 547; People v. Judge, etc., 24 Mich. 408; *Ex parte* Newman, 14 Wall. (U. S.) 152.

And in some cases corporations and officers have been required by mandamus to perform their duties as required by law, even where there was another remedy.[1] But this, as will hereafter be noticed, is not the general rule.

Nor will the fact that proceedings in a court of equity have been commenced for the same purpose, or that relief might be obtained in that court, necessarily defeat the right of a party to proceed at law, or furnish a reason for denying the writ.[2] But it will not be issued where the officer, corporation, or tribunal, against which it is claimed, has not the means to do the act required; or to compel the doing of an act, the doing or not doing of which rests in the discretion of the officer, corporation, or tribunal, against which it is claimed; or where they have not the means or power to do the act required;[3] or where the doing of the act is physically or legally impossible; or where the power to perform it is not complete, but depends upon the action or approval of some other person or authority;[4] or where it will involve the party in litigation, the result of which may be doubtful;[5] or where the act would be unlawful.[6]

But, where a discretion is allowed to such officer, corporation, or inferior tribunal, the refusal to exercise such discretion may constitute a proper case for the granting of the writ, which will compel action, but not direct the mode of action, or interfere in any manner with the discretion which the party may be authorized to exercise.[7] It may issue to compel a municipal corporation to levy a tax to pay a judgment against it;[8] to

[1] Mansfield v Fuller, 50 Mo. 338; State v. Bridgman, 8 Kans. 458; Buck v. Lockport, 6 Lans. (N. Y.) 253.

[2] People v. Chicago, 53 Ill. 424; Hardcastle v. Maryland, etc., R. Co.,32 Md. 32.

[3] State v. Burbank, 32 La. Ann. 318; *Ex parte* South, etc., v. Railroad Co., 44 Ala. 64; *Ex parte* Farrington, —— ———; Black v. Auditor, 26 Ark. 237; State v. Warmoth, 23 La. Ann. 76; Swan v. Gray, 44 Miss. 393; People v. Easton, 13 Abb. Pr. (N. S.) 159; Seymour v. Ely, 37 Conn. 103; Wells v. Stackhouse, 17 N. J. 311; *Ex parte* Decker, 6 Cow. 59; People v. Jameson, 40 Ill. 93; St. Louis v. Kean, 18 B. Monr. (Ky.) 9; Glasscock v. Commissioners, etc., 3 Tex. 51; Gray v. Bridge, 11 Pick. 189; State v. Lynah, 2 McCord (S. C.), 170.

[4] Ball v. Lappius, 3 Oreg. 55; Silverthorne v. Railroad Co., 33 N. J. 173; Ackerman v. Desha Co., 27 Ark. 457.

[5] State v. Perrine, 34 N. J. 255.

[6] Johnson v. Lucas, 11 Humph. (Tenn.) 306.

[7] McDiarmid v. Fitch, 27 Ark. 106; McMullin v. State, 26 id. 613; State v. Warmoth, 23 La. Ann. 76; East Boston Ferry Co. v. Boston, 101 Mass. 488; Commissioners v. Philadelphia, 3 Brewst. (Pa.) 596; *Ex parte* South, etc., R. Co., 44 Ala. 654; Appling v. Bailey, 44 id. (?) 333; 2 Add. on Torts (Wood's Ed.). 721, n. 1.

[8] U. S. v. Keokuk, 6 Wall. 514; Walkley v. Muscatine, id. 481.

compel assessors to correct an erroneous assessment;[1] to compel a railroad company to build and keep in repair bridges where the railroad crosses a highway;[2] to make the crossing of rivers or other water-courses, or perfom any acts in the construction of their road, prescribed by the charter, and affecting public or individual rights;[3] to restore an officer to his office when he has been removed therefrom, and the facts do not justify such removal, or are not clearly established;[4] to restore a member of any society to his membership, from which he has been wrongfully expelled;[5] to compel an officer to keep his office at the place designated by law;[6] to compel an officer who by law is required at the close of his duties to return his books to another officer to discharge that duty;[7] to compel the incumbent of an office to deliver up papers, property and insignia of his office to his successor when the claim of the successor thereto is clear;[8] to compel any public officer to discharge a ministerial duty imposed upon him by law;[9] to compel the registrar of deeds to record a deed required to be recorded in his office;[10] to compel a town committee to pay the land damages to land owners whose land may be taken for a highway;[11] to compel commissioners appointed to assess taxes for a specific purpose to assess such tax;[12] to compel a city council to appropriate money to pay certain expenses authorized by the legislature;[13] to compel the mayor and aldermen, or other board clothed with the requisite power, to carry out the specified purposes and perform the specific duties imposed upon them by law;[14] to compel trustees to admit children, entitled so to do, to attend the public schools;[15] to compel a board of canvassers to meet

[1] People v. Olmsted, 45 Barb. 644.

[2] People v. Troy, etc., R. Co., 37 How. Pr. 427.

[3] State v. North Eastern R. Co., 9 Rich. (S. C.) 247.

[4] Dew v. Judges, 3 H. & M. (Va.) 1; People v. Board of Police, 35 Barb. 531; State v. Common Council, 9 Wis. 254.

[5] Barrows v. Massachusetts Med. Soc., 12 Cush. 402; Roehler v. Aid Soc., 22 Mich. 86.

And see People v. Medical Society of Erie, 32 N. Y. 187.

[6] State v. Saxton, 4 Wis. 27.

[7] McDiarmid v. Fitch, 27 Ark. 106.

[8] Walter v. Belding, 24 Vt. 658; Church v. Slack, 7 Cush. 226; Sudbury v. Stearns, 21 Pick. 148.

[9] Ney v. Richards, 15 La. Ann. 603; Page v. Hardin, 8 B. Monr. 648; United States v. County Co., 1 Morris (Ia.), 31.

[10] Strong's Case, Kirby (Conn.), 345.

[11] Minhinnah v. Haines, 29 N. J. 388.

[12] People v. Williams, 51 Ill. 57.

[13] Commissioners v. Philadelphia, 3 Brewst. (Pa.) 596.

[14] East Boston Ferry Co. v. Boston, 101 Mass. 488.

[15] State v. Duffy, 7 Nev. 342.

and make complete canvass of all the returns received by them;[1] to compel a judge of an inferior court to sign a bill of exceptions in a case tried before him,[2] or to make up a record and give a judgment thereon, so that a writ of error may be brought;[3] to compel a judge to sign a judgment rendered by his predecessor;[4] to compel a judge to enter a judgment on the report of a referee;[5] to compel a clerk to issue execution on a judgment;[6] and to compel all officers, corporations and inferior tribunals, to perform all ministerial duties and specific acts, imposed upon or required of them by law.[7]

SEC. 501. **Concurrence necessary to authorize the issuing of the writ.**—The general rule, in reference to mandamus is, that to warrant the use of the remedy, there must be a concurrence of the following things, namely, that there is no other adequate legal remedy by which the specific performance of the duty, imposed upon the officer, corporation, or inferior tribunal, can be enforced;[8] that the duty can be enforced in a manner not to interfere with the discretion of the party against whom it is sought, when such discretion is vested in such party;[9] and that the plaintiff or relator has a clear legal right to the performance of the duty sought to be enforced.[10]

SEC. 502. **Where it will not be issued.**—We have referred to the circumstances, and cases, where it would be proper to allow the writ; but it may be proper to notice those where it may be prop-

[1] Florida v. Gibbs, 13 Fla. 55.

[2] Porter v. Harris, 4 Coll. (Va.) 485; People v. Judges, etc., 1 Caines (N. Y.), 511; State v. Hull, 3 Coldw. (Tenn.) 255; People v. Pearson, 3 Ill. 189; *Ex parte* Crane, 5 Pet. 190.

[3] *Ex parte* Bradstreet, 7 Pet. 634.

[4] Life Ins. Co. v. Wilson, 8 Pet. 291.

[5] Russell v. Elliott, 2 Cal. 245.

[6] People v. Loucks, 28 Cal. 68.

[7] Nelson v. Justices, etc., 1 Coldw. (Tenn.) 207; Chase v. Blackstone Canal Co., 10 Pick. 244; Strong, Petitioner, 20 id. 484; People v. Judge, etc., 1 Mich. 359; People v. Green, 64 N. Y. 499; People v. Supervisors, id. 600, where it was held that it should not be issued where the claim is disputed and its validity controverted.

[8] King v. Water Works Co., 6 Ad. & E. 355; People v. Supervisors, etc., 12 Barb. 27; Tarver v. Commissioners Court, 17 Ala. 527; Commonwealth v. Rosseter, 2 Binn. 360.

[9] State Nicholson Pavement Co. v. Mayor, 35 N. J. 396; People v. Easton, 13 Abb. Pr. (N.S.) 159; People v. Supervisors, 12 Barb. 217; Railroad Co. v. Clinton Co., 1 Ohio St. 77.

[10] People v. Thompson, 25 Barb. 73. See, also, People v. Head, 25 Ill. 325; People v. Hilliard, 29 id. 418; People v. Corporation of Brooklyn, 1 Wend. 318; People v. Supervisors, 64 N. Y. 600.

erly refused. The writ should not be issued to command an act which is physically or practically impossible;[1] or to compel the doing of an act which is prohibited by injunction;[2] or where the defendant has no power to perform the act;[3] or where it would be fruitless and ineffectual;[4] or where the act is not required to be performed as incident to the defendant's duties;[5] or generally to enforce a mere contract,[6] or to compel the doing of an unlawful act;[7] or where there is a lawful reason for not doing the act, as where a party refuses to discharge a mortgage, on the ground that the certificate is insufficient, or to record a deed, not properly acknowledged or attested, or for any cause not entitled to go upon the records;[8] or to admit a person to a medical society, where he would be immediately liable to expulsion;[9] or generally, when the right claimed depends upon holding an act of the legislature unconstitutional and void;[10] or to try the title to an office;[11] or to compel the payment of liquidated damages;[12] or to prevent an anticipated error, or defect of duty.[13]

The remedy by the writ of mandamus was strictly a legal remedy in contra-distinction from an equitable one. And it may perhaps be safely affirmed that in modern practice the remedy by mandamus can only be used to enforce a legal duty where such duty is free from reasonable doubt and where the rights and interests of the party seeking it are clear, and where the remedy

[1] Silverthorne v. Warren R. Co., 33 N. J. 173; State v. Perrine, 34 id. 254; State v. Police Jury, 22 La. Ann. 611; Ackerman v. Desha Co., 27 Ark. 457; Ball v. Lappins, 3 Oreg. 55; People v. Salomon, 54 Ill. 39; Commissioners v. Baroux, 36 Pa. St. 262; People v. Supervisors, 15 Barb. (N. Y.) 607; Commissioners v. Supervisors, 29 id. 129; People v. Tremain, id. 96; People v. Mayor of N. Y., 10 Wend. 393.

[2] Railroad Co. v. Wyandot Co., 7 Ohio St. 278; *Ex parte* Fleming, 4 Hill (N. Y.), 581. But see Briggs v. Johnson Co., 6 Wall. 166; *post*, § No. .

[3] People v. Supervisors, 15 Barb. 607.

[4] Commissioners v. Supervisors, 29 Pa. St. 121.

[5] State v. County Judge, 1 Ia. 425; Pickett v. White, 22 Tex. 559.

[6] State v. Zanesville, etc., Co., 16 Ohio St. 278.

[7] Gillespie v. Wood, 4 Humph. (Tenn.) 437; Johnson v. Lucas, 11 id. 306; Ross v. Lane, 11 Miss. 695.

[8] People v. Minor, 32 Barb. 612.

[9] *Ex parte* Paine, 1 Hill (N. Y.), 665.

[10] Hall v. Supervisors, 20 Cal. 591; People v. Stephens, 2 Abb. Pr. (N. Y.) N. S. 348.

[11] People v. Stevens, 5 Hill (N. Y.), 615; People v. Detroit, 18 Mich. 338; Bonner v. State, 7 Ga. 473.

[12] Haygood v. Justices, etc., 19 Ga. 97.

[13] State v. Carney, 3 Kans. 88; State v. Burbank, 22 La. Ann. 298; State v. Dubuclet, 24 id. 16.

will be effectual, and not of trifling consequence or importance.[1]

SEC. 503. **Resemblance and distinction between, and injunction.** — This extraordinary process in some respects resembles the writ of injunction. Each are only granted in extraordinary emergencies, and in each, the right depends upon the discretion of the court.

But while the former is the right arm of courts of law to command a duty to be performed, the latter may be considered the right arm of courts of equity to prohibit unlawful and inequitable acts and things from being done. The former is a positive remedy to redress an existing grievance, while the latter is a negative one, and usually, at least, is only invoked to restrain a future or contemplated injury.[2]

SEC. 504. **Mandamus against private corporations or its officers.** — We have considered the rules and practices relating to mandamus, generally, but it may be proper to consider, especially, some cases where the writ may be used against a private corporation for pecuniary gain, and its officers. In such cases it is an efficient remedy to enforce the performance of duty. Thus, where the charter imposes upon the corporation or some officer the duty of keeping a register and inserting therein the names of the shareholders, this duty may be compelled by mandamus.[3] It would also be an appropriate function of the writ to require the directors of a corporation to admit and swear in, as director, one who has been duly elected as such;[4] to require the admission of members to all the privileges of membership;[5] to compel the master of a hospital, incorporated for charitable purposes, to put the common seal to an instrument of presentation;[6] to place a minister in possession of

[1] Hall *v.* Crossman, 27 Vt. 297; People *v.* Tremain, *ante.* A mandamus will issue to an inferior court to compel the specific performance of an official duty to which a party is clearly entitled, and which is refused to him, when no other effectual remedy exists, but the particular mode of its exercise must be left free from coercion or restraint. Seymour *v.* Ely, 37 Conn. 103; McMillen *v.* Smith, 26 Ark. 613; People *v.* Judge, etc., 1 Mich. 359.

[2] Board of Liquidation *v.* McComb, 2 Otto (U. S.), 531.

[3] Norris *v.* Irish Land Co., 8 El. & Bl. 525; Swan *v.* North British, etc., Co., 31 L. J. Ex. 425.

[4] 2 Str. 696; 2 Add. on Torts (Wood's ed.), § 1496, n.

[5] Dacosta *v.* The Russia Co., 2 Str. 783; Rex *v.* March, 2 Burr. 1000; Reg. *v.* Saddlers' Co, Bail Court Cas. 183.

[6] Reg. *v.* Kendall, 1 Q. B. 366.

a pulpit of which he has been unjustly deprived;[1] to compel a railroad or canal company, to build or repair, when such duty is imposed upon them by law;[2] and to so grade a railroad track so as to make the streets, alleys and crossings convenient of access and practically useful;[3] to complete its railroad when by law it is required so to do;[4] to pursue the course prescribed by its charter in crossing streams and water-courses, so as not to interfere with navigation;[5] and to compel a cashier of a bank to allow a director to examine the books.[6]

And it may be affirmed as a general doctrine of the law that a mandamus will issue in all cases to compel a corporation, or any particular officer, to perform any plain duly required by law, in favor of a member or other interested party, whether such duty is imposed either by statute, charter, custom or contract.[7]

The general doctrines in relation to the functions of this process and the practice in such cases, are elucidated and illustrated by the supreme court of Massachusetts in the case of Strong, Petitioner,[8] although the proceeding in this case related to a municipal corporation. The general principles, relating to the remedy, are applicable to either class of corporations.

The petitioner in this case was duly elected county commissioner, but the board of examiners refused to give him a certificate and ordered another election at which another person was chosen. It was held, that mandamus would lie to the board of examiners to compel them to give a certificate, notwithstanding he might be compelled to proceed, subsequently, by quo warranto, to remove the incumbent of the office, chosen at the second elec-

[1] Runkle v. Winemeler, 4 H. & J. (Ind.) 397; People v. Steele, 2 Barb. (N. Y.) 377.

[2] People v. Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427; Habersham v. Canal Co., 26 Ga. 665.

[3] Chicago, etc., R. Co. v. People, 56 Ill. 365.

[4] State v. Southern Minn. R. Co., 18 Min. 40.

[5] State v. Northern R. Co., 9 Rich. (S. C.) 247.

[6] People v. Throop, 12 Wend. 183; People v. Mott, 1 How. Pr. (N. Y.) 247.

[7] Insurance Company v. Mayor 23 Md. 296; Chicago, etc., R. Co. v. People, 56 Ill. 365; Indianapolis, etc., R. Co. v. State, 37 Ind. 489; State v. Southern Minn. R. Co., 18 Minn. 40; Burton, *In re*, 31 L. J. Q. B. 62; Rex v. Merchant Tailors Co., 2 B. & Ad. 115; Rex v. Hotsman of Newcastle, 2 Str. 1223; Reg. v. London, etc., R. Co., 13 Q. B. 998; Reg. v. Wing, 17 id. 645; Reg. v. Gen. Cem. Co., 6 El. & Bl. 415; Norris v. Irish L. Co., 8 id. 512; Reg. v. Midland, etc., R. Co., 15 Ir. Co. L. R. 525.

[8] Strong, petitioner, 20 Pick. 494 See, also, Curtis v. McCullough, 3 Nev. 202.

tion. The opinion of the court may be found in the annexed note.[1]

[1] In this case the court say:

"It has been contended for the respondents, that the petitioner has mistaken his remedy, and that mandamus will not lie. It was said that his appropriate remedy, if he has any, is by quo warranto and not by mandamus, or, at any rate, that a quo warranto should precede a mandamus.

"In every well-constituted government the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty, it will compel them. In the former case by writ of error, in the latter, by mandamus. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy, resort may be had to this high judicial writ. It not only lies to ministerial, but to judicial officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion, upon a particular subject. Springfield *v.* County Commissioners, etc., 10 Pick. 59.

"Mandamus is the proper process for restoring a person to an office from which he has been unjustly removed. White's Case, 2 Ld. Raym. 959, 1004; Regina *v.* Baines, 1265; Rex *v.* Chancellor, etc., of Cambridge, id. 1334; Rex *v.* London, 2 T. R. 177; Rex *v.* Field, 4 id. 125. So, also, it lies to admit any one to an office, a service or a franchise from which he is unlawfully excluded. 6 Dane's Abr. 326; Rex *v.* Surgeon's Company, 2 Burr. 892; Rex *v.* Barker, 3 id. 1265; S. C., 1 W. Bl. 300; Rex *v.* Bedford Level Corp., 6 East, 356; Rex *v.* York, 4 T. R. 699, and 5 id. 66.

"But it is strongly argued by the respondents' counsel, that inasmuch as the office claimed by the petitioner is now filled by another, who can be removed only by a quo warranto, a mandamus will not lie. And, certainly, many of the authorities cited by them, support the position, that a mandamus will not lie to place one in an office actually filled by another, until the incumbent has been removed by a quo warranto. The case from 3 Johns. Cas. 79, The People *v.* New York, is directly in point. The court there say, that 'where the office is already filled by a person who has been admitted and sworn and is in by color of right, a mandamus is never issued to admit another person.'—'The proper remedy, in the first instance, is by an information in the nature of a quo warranto by which the rights of the parties may be tried.'

"But notwithstanding the respectability and weight of this and the other authorities cited, there certainly are very many the other way; of which the case of Dew *v.* The Judges of the Sweet Springs District Court, 3 Hen. & Munf. 1, is one. Dew applied for a mandamus to the judges, to admit him to the office of clerk. It was objected among other things, that the office was already filled and the only remedy was by a quo warranto against the incumbent. But all the judges of the Supreme Court of Appeals of Virginia 'agreed clearly that mandamus was the best remedy.'

"See, also, 6 Dane, 335, and the cases there cited. Mr. Dane, with whom we concur, says: 'On the whole the authorities, English and American, are much in favor of the mandamus, especially the more modern cases.'

"But the cases relied upon by the respondents, if in nowise shaken or overruled, are clearly distinguishable from the one before us, and may stand as sound law, and yet form no obstacle to the petitioner's application. The cases referred to were applications to be *admitted* to an office. The petitioner only seeks for a *certificate* of his election. This, if he obtains it, will not necessarily oust the incumbent or give the petitioner possession of the office. For these purposes he may still have to resort to a quo warranto, and possibly before he can get qualified to another mandamus. Two processes may be necessary to enable the petitioner to get possession of the office, the one to establish the legality of his own election, the other to set aside that of the incumbent. They are in-

A judgment creditor of a corporation for pecuniary gain, may also, compel the corporation, by mandamus, to give him an inspec-

dependent of each other. Both might have been applied for at the same time and proceeded *pari passu*. Had the petitioner first caused the incumbent to be removed, by a quo warranto, still, without the evidence of his own election, he could not enter into the office. So, if a mandamus be now issued and complied with, he may still be obliged to resort to other legal proceedings before he can get regularly inducted.

The King *v.* The Mayor, etc., of York, 4 T. R. 699, and 5 id. 66, is analogous to the case at bar. An election of a recorder of the city of York was holden, and a certificate was given to Sinclair that he was duly elected. The certificate was to be presented to the king, for the purpose of obtaining his approbation of the election. Withers, the other candidate, applied for a mandamus to the corporation to give him a certificate, he having, as he alleged, a majority of the *legal* votes, and his opponent having gained the election only by the votes of persons not qualified to vote. An alternative mandamus issued, and afterward, the return to that being insufficient, a peremptory one was ordered. Many other cases to the same effect might be cited, but without a further reference to authorities we are clearly of opinion that a mandamus is the proper remedy in this case.

"We are aware that this is not a writ of right, but grantable at the discretion of the court; Rex *v.* Commissioners of Excise, 2 T. R. 385; that inasmuch as it is final and cannot be revised, on error or otherwise, the court will proceed with great caution in the exercise of so high a jurisdiction; Selwyn's N. P. (6th ed.) 1062, 1 Chit. Gen. Prac. 791; and that they will not grant it where there is any other adequate specific remedy. 1 Chit. Gen. Prac. 790; Rex *v.* Bp. of Chester, 1 T. R. 396; Rex *v.* Abp. of Canterbury, 8 East, 219. But we have no doubt that the present is the proper case for the exercise of our discretion; and that to refuse to grant the writ would be doing palpable injustice to the petitioner and defeating the will of a majority of the voters of the county clearly manifested by their votes, duly and legally evidenced before the proper tribunal. No other remedy can reach the error. Although a quo warranto might remove the illegal occupant, it could not put the legal officer in his place. No civil action could be maintained by the petitioner, because there is no reason to doubt that the examiners acted *bona fide* and with a sincere desire to perform their duty correctly and legally. And if it could, it would be a very imperfect and partial remedy.

"It cannot be maintained that the decision of the examiners was an act within their legal discretion. Whether their determination as to the reception or rejection of returns would be deemed a *judicial* decision, may well be doubted. But nothing can be clearer than that the counting of the votes, and ascertaining the majority, and giving certificates of the result, are mere ministerial acts. They have no *discretion* in determining which of the candidates shall be elected. It must be the result of pure, inflexible mathematical calculation.

"We are, therefore, all of opinion, that the petitioner, in first seeking to have the validity of his own election inquired into, pursued a wise and legal course, that the proper remedy is by mandamus, and that justice clearly requires that such a writ be issued. But the usual, if not invariable practice is, in the first instance, to grant it in the alternative form, giving the examiners a further opportunity either to give the certificate or to return the reasons for refusing it. As the case has been fully heard, they will doubtless adopt the first branch of the alternative, unless facts or reasons occur to them which have not been presented to the court."

"In Woodstock *v.* Gallup, 28 Vt. 587, the proper office and practice upon writs of *certiorari* and mandamus, in the nature of a *procedendo*, was carefully considered, and the court (REDFIELD, C. J.) say: 'The statute, chap. 28, § 5, gives this court power to issue writs of 'error, *certiorari*, mandamus prohibition, and quo warranto, and all other writs and processes to courts of inferior jurisdic-

tion of the register of shareholders;[1] and the right to a transfer of shares on the entry of the probate of the will of a deceased share-

tion, to corporations and individuals, that shall be necessary to the furtherance of justice,' etc.

"The authority thus conferred has been regarded as co-extensive with the authority, in this respect, exercised by the Court of King's Bench, in England, so far as applicable to our condition and wants. And it has generally been the purpose of this court to adopt, substantially, the forms used in the King's Bench. But the organization and course of proceeding, in the superior courts, in reference to actions pending in the inferior courts, is essentially different in England from what it is in this state. As this court is now constituted, we have no general original jurisdiction, either civil or criminal, and no jury trials. And it has never been the practice to bring cases from the inferior courts into this court for trial, which is the principal use of the writ of *certiorari*, in England, where it is more generally confined to criminal proceedings; 4 Black. Com. 320–321; 5 Petersdorff's Abr. 114 [149]; 1 Bac. Abr., tit. *Certiorari;* F. N. B. 245. But the cases reported under the title *Certiorari* in 5 Pet. Abr. 149, *et seq.*, shows that the *certiorari* is the substitute for a writ of error, in cases where the proceedings are not according to the course of the common law, and where, by consequence, no writ of error lies; and it extends to such proceedings as laying highways, and other judicial proceedings and matters, in the sessions and other inferior tribunals. But in our practice, we never, upon writs of error, remand a case which is brought into this court and judgment reversed, where further proceedings are required, unless an issue of fact, proper to be tried by the jury, arises, but the case in all other respects is finished in this court. In analogy to this, we have never, that I am aware of, brought up a sessions matter into this court until it was finished in the inferior court, by a decision upon its merits. Rand *v.* Townshend, *supra;* Paine *v.* Leicester, 22 Vt. 44.

"It seems to us that the more appropriate remedy in cases like the present, where the inferior court disposes of the matters upon some incidental question, and decline to hear the case upon its merits, is a writ of mandamus, in the nature of a *procedendo*, as was held by the supreme court of the United States, in Livingston *v.* Dorgenois, 7 Cranch, 577; 2 Curtis, 677; and as was virtually done in *Ex parte* Crane, 5 Pet. 190, where a mandamus was issued to the judge of the circuit court, in the district of New York, requiring him to sign a bill of exceptions. The writ of mandamus is the supplementary remedy, so to speak, where the party has a clear right, and no other appropriate redress, to prevent a failure of justice. 3 Black. Com. 110; 12 Pet. Ab. 438 (309). It is the absence of a specific legal remedy, which gives the court jurisdiction; 2 Sel. N. P., title Mandamus. But the party must have a specific legal right; Rex *v.* Barker, 3 Burrow, 1265; ELLENBOROUGH, C. J., 8 East, 219. The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons, in some cases; but more generally the English Court of King's Bench declines to interfere, by mandamus, to require a specific performance of a contract where no public right is concerned; Lord MANSFIELD, in King *v.* Barker, 3 Burrow, 1265–1270; Angell & Ames on Corp. 761; The King *v.* The Mayor of Colchester, 2 Term, 260; The King *v.* Corporation of Bedford Level, 6 East, 356. There is almost no end to the cases upon this subject. They will be found digested, under the title Mandamus, in Petersdorff's Abr. and Bacon's Abr.

"The case of Walker *v.* The London & Blackwall Railway, 3 Q. B. 744, is a case almost precisely in point. The sheriff was required to hold inquisition upon petitions for land damages against railways. Upon the trial of the plaintiff's case, the sheriff directed the jury to find a verdict for the defendants, on the ground that the plaintiff was not entitled to compel the company to purchase his property. The Queen's Bench, on application for

[1] Reg. *v.* Derbyshire, etc., R. Co., 3 Ell. & Bl. 784.

holder, on the proper books of the company, may be enforced by mandamus.[1] So, in England, it has been held that where a corporate body is clothed with authority to make contracts, and to make calls, from time to time, on the shareholders, and contracts are made with the corporation on the expectation that it will exercise these powers, and it is clear that the corporation is attempting to evade the payment of its debts and satisfaction of a judgment rendered against it, claiming that it has no corporate assets wherewith to satisfy the same, the court will, by mandamus, compel it to exercise its powers for the raising of funds to answer the demands of the creditor.[2]

SEC. 505. **Corporations may invoke its aid.**— The writ may also be issued in favor of corporations, in all those cases where a private person might, under the same circumstances, invoke the aid of the same to secure a private and individual right. Thus, a board of supervisors may be compelled by mandamus to subscribe for stock in a railroad company, or issue county bonds to such company when, by the provisions of the statute, it is their duty

a peremptory mandamus, decided that the writ must issue, requiring the sheriff to proceed and assess the damages, disregarding his former judgment and the verdict of the jury. The form of the writ there issued was a mandamus, in the nature of a *procedendo*, as in the present case. But very likely the same thing might only be done by mandamus, in regard to those tribunals to which the superior court had power to issue the writ of *certiorari*. For if that were taken away, by statute, it would be regarded as an evasion to accomplish the same thing, more directly, by mandamus; Rex *v.* Justices of Yorkshire, 1 Adol. & El. 563. See *In re* Edmundson, 24 Eng. L. & Eq. 169.

"In Com'th *ex rel.* Hamilton *v.* Select and Common Councils of Pittsburg, 34 Penn. St. 496, it is held that a clear legal right in the relator, a corresponding duty in the defendants, and a want of any other adequate and specific remedy, presents a fit case for a mandamus; that it is the proper and appropriate remedy to compel a municipal corporation to make provision for the payment of interest, due upon bonds issued by it in payment of a subscription to the stock of a railway company, but the assessment and collection of the necessary taxes, — that the writ need not set forth when the principal will become due, nor when or where the interest is to be paid. The averment of the petitioner's ownership is sufficient without setting forth the particulars of his title, and that the defendants have refused to make provision for the payment of the interest without averring a demand."

[1] Reg. *v.* London, etc., R. Co., 13 Q. B. 998; Reg. *v.* Wing, 17 id. 645; Reg. *v.* Gon. Cem. Co., 6 Ell. & Bl. 415; Rex *v.* Worcester Can Co., 1 M. & Ry. 529.

[2] Rex *v.* St. Katharine Dock Co., 4 B. & Ad. 360. But a mandamus will not issue merely because the execution may produce no fruits. Reg. *v.* Victoria Park Co., 1 Q. B. 293.

so to do;[1] and it may be used to compel a state treasurer to return municipal bonds, where they have been illegally voted and issued in aid of a railway;[2] to compel the commissioner of a land office to issue certificates for lands to which a railroad corporation is entitled;[3] and it has been held proper to compel county officers to levy tax on a county to satisfy a judgment, in a circuit court of the United States, rendered on the bonds issued, as provided by law, to a railroad corporation, even where previous to the application to the circuit court for the writ, but subsequent to the rendition of the judgment, the officers have been enjoined by a state court from making such levy.[4]

The decision of the supreme court of the United States, in this case, rested upon the ground that the jurisdiction of the circuit court, in the matter, was prior to that of the state court; that the jurisdiction of the circuit court continued after the judgment rendered, for the purposes of the mandamus, and that it could not be ousted of it, as the powers of the court would be useless if its judgments could not be enforced by the requisite and necessary process.[5] Mandamus is also a proper remedy for a private corporation, against persons wrongfully claiming to hold its offices.[6]

SEC. 506. **To compel inspection or delivery of corporate books and papers.**— The remedy by mandamus is frequently resorted to, to compel the production, inspection, or surrender, of books and records of private corporations, to persons entitled thereto. Thus, where the term of office of an officer of a private corporation has expired by lapse of time, removal, or otherwise, and his successor, duly appointed and qualified, is entitled to the custody of such books and records, which right is refused by the former officer, it is a proper case for the remedy by mandamus, to compel the performance of the duty.[7]

[1] Napa Valley R. Co. *v.* Napa Co., 30 Cal. 435; California, etc., R. Co. *v.* Butte Co., 18 Cal. 671.

[2] Bay City *v.* State Treasurer, 23 Mich. 499.

[3] Houston, etc., R. Co. *v.* Commissioner, 36 Tex. 382.

[4] Riggs *v.* Johnson County, 6 Wall. (U. S.) 166.

See, also, Weber *v.* Lee County, id. 210; United States *v.* Council of Keokuk, id. 514; Mayor *v.* Lord, 9 Wall. 409; Supervisors *v.* Durant, id. 736.

[5] See, also, Wayman *v.* Southard, 10 Wheat. 23; Suydam *v.* Williamson, 20 How. 437; 2 Tidd's Pr. 1134.

[6] American Railway Frog Co. *v.* Haven, 101 Mass. 398; 3 Am. R. 377.

[7] American Railway Frog Co. *v.* Haven, 101 Mass. 398; State *v.* Goll, 3 Vroom. 285; St. Luke's Ch. *v.* Slack, 7 Cush. 226.

And where a stockholder shows a right, to the inspection of books and records of a corporation, which right is refused, proceedings by mandamus is an appropriate remedy to enforce the right.[1] In this way the cashier of a bank may be compelled to submit the books of the bank to the inspection of one of the directors.[2]

But the aid of this extraordinary remedy will not be granted except some laudable or beneficial purpose is to be subserved. And a member of a private corporation could not claim the benefits of the process merely to gratify malice, or caprice, or an idle curiosity. "And, unless," observes Mr. High, "there is some particular matter in dispute between the members of the corporation, or between the corporation and its individual members, or some specific purpose for which the inspection is necessary, mandamus will not lie, since the courts will not permit the use of the writ upon merely speculative grounds, or to gratify a spirit of curiosity."[3]

Nor can a stockholder claim this process to compel the company to keep its books of account at the principal office or place of business of the corporation, unless he shows that some personal injury will result to him by the keeping of the books elsewhere.[4]

And it is not a sufficient answer to a just claim for the inspection of books, that they were purchased by the officer having charge of them with his own private funds, and that the corporation has not refunded the money thus expended, and is indebted to the officer for his salary.[5] Nor is it good ground for refusing a mandamus, that the books are books of account between the corporation and its stockholders, and that, therefore, these should be regarded as confidential; or that they might be used for purposes not strictly proper, or such as would justify the issuing of the writ.[6] A judgment creditor is entitled to the

[1] People v. Throop, 12 Wend. 183; People v. Pacific Mail Steamship Co., 50 Barb. 280.

[2] People v. Throop, *supra*.

[3] High on Extra. Leg. Rem., § 310. See, also, People v. Walker, 9 Mich. 328; Hatch v. City Bank, 1 Rob. (La.) 470; King v. Merchant Tailors' Co., 2 Barn. & Ad. 115. In such a case there should also be a demand of the papers and records at a proper time and place and of the proper party. People v. Walker, 9 Mich. 328; King v. Wilts Canal Co., 3 Ad. & E. 477.

[4] Pratt v. Meriden Cutlery Co., 35 Conn. 36.

[5] State v. Goll, 3 Vroom, 285.

[6] People v. Pacific Mail Steamship Co., 50 Barb. 280.

process where he is entitled to an execution against stockholders who have not paid their shares, and an inspection of the books of the corporation becomes necessary in order to ascertain who are the shareholders and the amount of the subscription remaining unpaid, and which inspection is refused.[1] And it is also an appropriate remedy, where it is the duty of an officer of a corporation, on the presentation of a certificate of sale of shares of capital stock under execution, to give the purchaser evidence of title to the stock thus purchased, which he refuses to do;[2] or, where it is the duty of the corporation to enter upon the proper books of the company, a record of the probate of the will of a deceased stockholder, showing the disposition of his stock, and the corporation refuses so to do;[3] and, especially, where it is the duty of a corporation to record all the names of the owners of the stock, and it refuses so to do.[4]

SEC. 507. **As a remedy against railroad corporations.** — The remedy, by mandamus, against railroad corporations is frequently appropriate; and it may be invoked to compel a railroad corporation to carry out or execute the objects and purposes for which it was created.

Thus, it has been held proper to compel a railroad company to transport passengers to a particular terminus, in accordance with the requirements of its charter;[5] to compel the replacement of certain portions of its track, taken up, where its charter provided that the public should have the right to use the railway upon the payment of certain rates of fare and freight;[6] to compel the company to have damages for the taking of lands under the right of eminent domain, assessed in the manner provided by law, and in the absence of other specific remedy, to compel payment of the amount of damages awarded;[7] to construct and keep in repair

[1] Queen *v.* Derbyshire, etc., R. Co., 3 El. & Bl. 784.

[2] Bailey *v.* Strohecker, 38 Ga. 259.

[3] Rex *v.* Worcester, etc., Co., 1 Man. & Ray. 52.

[4] Norris *v.* The Irish Land Co., 8 El. & Bl. 512.

But see where it will not be issued for this purpose. State *v.* Warren, etc., Co., 3 Vroom, 439.

[5] State *v.* The Hartford, etc., R. Co., 29 Conn. 538.

[6] King *v.* Swem, etc., R. Co., 2 B. & A. 644.

[7] Queen *v.* Eastern Counties R. Co., 2 Ad. & E. (N. S.) 347; King *v.* Water Works Co., 6 Ad. & E. 355; Queen *v.* Trustees, etc., 8 id. 439; Queen *v.* Deptford Pier Co., id. 910.

bridges as required by their charters, and so as not to obstruct the navigation of streams;[1] to maintain all necessary crossings and culverts at the crossing of streets and alleys of a city, and make them safe and convenient for passage as provided by the conditions of the right of way, granted by the city to the company;[2] and in general to compel them to construct and maintain suitable crossings and approaches where the railroad crosses public streets and highways.[3]

SEC. 508. **To whom the writ should be directed — service.** — It is not within the scope of this treatise to consider the practice and proceedings, in mandamus, generally. Special treatises are devoted to the treatment and elucidation of the law in general relating to it. We will, however, observe that the writ should be directed to and served upon the person who is shown to be delinquent. If the proceeding is to obtain the books and records of the corporation or their inspection, the proper course would seem to be, to direct the process to the person in whose custody they are, even though they may be held by the party as the officer or agent of the corporation, as cashier, treasurer or secretary.[4] The common-law mode of service was by delivering a copy of the writ, and showing the respondent the original;[5] but the mode of service in this country is generally regulated by statutes in the various states.

[1] State *v.* Wilmington Bridge Co., 3 Harr. (Del.) 312; State *v.* Northeastern R. Co., 9 Rich. 247; Habersham *v.* Savanna, etc., Canal Co., 26 Ga. 665.

[2] Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

[3] People *v.* Chicago, etc., R. Co., 57 Ill. 436 (1873); Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489.

[4] People *v.* Throop, 12 Wend. 183.

[5] Reg. *v.* Birmingham, etc., R. Co., 1 El. & Bl. 293; 22 L. J. Q. B. 195; Corner's Crown Pr. 227.

CHAPTER XXII.

TAXATION.

SEC. 510. **Taxation defined — necessity of.** — Taxation is defined as "the act of laying a tax, or imposing taxes, on the subjects of a state by government, or on the members of a corporation or company by the proper authority."[1] Tax is any contribution imposed by the government upon individuals or corporations for the use of the state, and embraces tolls, tribute, impost, duty, custom, excise, aid or supply. But in a stricter or more limited sense, it is a levy or sum imposed by the state upon persons, or real or personal property and occupations, as distinguished from customs, duties and excises.[2]

Taxation is one of the fiscal prerogatives and inherent powers of sovereignty, and essential to the maintenance of government and the security of the rights of the citizen.[3]

SEC. 511. **Should be equally imposed.** — The wisdom of legislators are taxed in adopting means to levy and collect taxes in such

[1] Web. Dic.

[2] 2 Bouv. L. Dic., tit. Taxes; 2 Bur. L. Dic., tit. Tax; Story on the Const. 14. Mr. Burrill observes in reference to the word "tax" as follows: 'Literally, or according to its derivation, an imposition laid by government upon individuals, according to a certain order and proportion." Bur. L. Dic., tit. Tax.

Mr. Cooley defines taxes as "the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government, and for all public needs." Cooley on Taxation, 1.

[3] 1 Bl. Com. 307 *et seq.*

a manner as that the burden shall be borne equally and equitably by all citizens.[1] The usual method of imposing this burden is to require the assessment of taxes according to the value of property, and to levy and collect for governmental purposes annually a certain percentum of the valuation of all property, real and personal, owned by individuals, partnerships or corporations.[2]

It will be manifest that corporations should contribute to this public demand as well as individuals, as they, equally with natural persons, enjoy the benefits of civil government and the protection thus afforded to its pecuniary interests, and they should be subject to the same burdens, unless they are exempted therefrom by the provisions of their charter.[3] The legislature of the state, as the representative of the people, is supreme, unless restrained by provisions of its constitution, and may exempt corporations or individuals, or their property, from taxation; but where there is no such exemption, all owners of property should equally contribute, according to its value, to the necessities of the government.[4]

[1] 2 Kent's Com. 250. Perfect equality and uniformity is practically impossible. Cooley on Taxation, 124 *et seq.;* Kirby *v.* Shaw, 19 Pa. St. 258; Mill. Pol. Econ., B. 5, ch. 2, § 2; Lowell *v.* Oliver, 8 Allen, 247; Ould *v.* Richmond, 23 Gratt. 464; Allen *v.* Drew, 44 Vt. 174.

[2] The constitution of Massachusetts provided that the legislature might "impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same." Under this constitutional provision the supreme court of that state held that the legislature might impose a specific tax on the stock of an incorporated bank. Portland Bank *v.* Apthorp, 12 Mass. 252.

See, also, Commonwealth *v.* Lowell Gas Co., 12 Allen, 75; Commonwealth *v.* Hamilton Man. Co., id. 298; Same *v.* New England Slate Co., 13 id. 391; Same *v.* Carey Improvement Co., 98 Mass. 19; Attorney-Gen. *v.* Bay State Min. Co., 99 id. 148; Oliver *v.* Liverpool Ins. Co., 100 id. 531; 10 Wall. 566; Boston R. Co. *v.* Commonwealth, 100 Mass. 399; Dudley *v.* Jamaica Aqueduct Pond Co., id. 183.

And in Massachusetts domestic corporations cannot be required to pay a portion of all dividends of the non-resident owners into the treasury of the state where there is no such tax on the dividends of resident owners. Oliver *v.* Washington Mills, 11 Allen, 268.

[3] Harvard College *v.* Aldermen of Boston, 104 Mass. 470; Troy *v.* Mutual Bank, 20 N.Y. 387; People *v.* Brooklyn, 4 Comst. 419; Bulowe *v.* Charleston, 1 N. & McC. 527; Shitz *v.* Berks Co., 6 Bar. 80; Dunnell Man. Co. *v.* Pawtucket, 7 Gray, 277. But the right to exempt corporate property from taxation has been questioned on the ground of public policy, and that it is inimical to the security of government. The reasons would be equally applicable to all exemptions. Thorpe *v.* The Rutland, etc., R. Co., 27 Vt. 140; Brewster *v.* Hough, 10 N. H. 138.

[4] See West River Co. *v.* Dix, 6 How. 507; Bank of Commerce *v.* New York, 2 Black. (C. C.) 620; Duer *v.* Small, 4 Blatchf. 263, where it is held that the power extends to all the property and business within the state. People *v.* Pacheco, 27 Cal. 175; De Pauw *v.* New

SEC. 512. **Difficulty attending taxation of railroad property and interests.** — Some difficulty has been experienced, relating to the taxation of corporate property, and especially the property of railroad corporations. The operation of railroads usually requires the use and ownership of property in various localities, not only within the territory of the sovereignty of its creation, but frequently in different states. Besides, the capital stock of such corporations may be held not only by the corporation itself, but by its numerous members, having a residence and domicile in various localities, not only within the state where the corporation is created, but in other states. Where shall such property and interests be taxed? If it may be assessed and taxed according to value in more than one place for the same purpose, the burdens of taxation would fall unequally. And in the case of specific taxation of property or business, the tax should be imposed so as to fall equally upon all persons, whether natural or artificial.[1]

SEC. 513. **Statutes regulating taxes.** — The difficulty attending the imposition of taxes for various municipal and state purposes upon railroads, on account of the various kinds of property and interests held by them in various localities and states, has secured statutory regulation on the subject in most, if not all, the states and territories of the Union; and the constitutions of various States guard the rights of citizens against legislative abuse, in this respect.[2]

But in the absence of statutory regulations, how and where shall corporate property of a railroad company be valued and

Albany, 22 Ind. 204; Union Co. *v.* Bordelon, 7 La. Ann. 193; Williams *v.* Detroit, 2 Mich. 560; Mechanics' Bank *v.* Debolt, 1 Ohio St. 591; 2 Kent's Com. 331 and notes; Cooley on Taxation, 15–392 *et seq.*

[1] The tax levied by a city must not be oppressive or unequal. Columbia *v.* Beasly, 1 Humph. (Tenn.) 232; Hamilton *v.* St. Louis County Court 15 Mo. 3. But in Arkansas, where the constitution provided for equal taxation according to the value of property, it was held that this provision related to ordinary state and county taxation, and did not affect a statute authorizing a special tax on alluvial lands for building a levee. McGehee *v.* Mathis, 21 Ark. 40. See, also, State *v.* Lathrop, 10 La. Ann. 398; State *v.* Ogden, id. 402; Yeatman *v.* Crandall, 11 id. 220; Jamison *v.* New Orleans, 12 id. 346; Selby *v.* Levee Coms., 14 id. 434; Lowell *v.* Oliver, 8 Allen, 247; State *v.* Warren County, 19 Pa. St. 258; Slaughter *v.* Commonwealth, 13 Gratt. 767; Kneeland *v.* Milwaukee, 15 Wis. 454; Fire Department *v.* Helfenstein, 16 id. 136.

[2] See 2 Kent's Con. 331 *et seq.*

taxed? Shall the land and improvements thereon, including the erections and fixtures, and rolling stock, be assessed and taxed as an entirety or separately? Should they be taxed at the location of the general office or place of business of the corporation, or in the various places where they may be located or used?

As to the mode of taxing the property of railroad companies, it has been ably maintained, that the only just and equitable way is that based upon profits. In the case of *Paine* v. *Wright and The Indianapolis & Bellefontaine R. Co.*,[1] the court say:

"Railroads have contributed more to the facilities of intercourse, the interest of agriculture, to build up towns and extend our inland commerce, than all other improvements. But in the construction of these works, heavy expenditures have been incurred, and large debts contracted by way of loans of money and otherwise, so that the companies are ill able to bear the pressure of a heavy taxation. The expense of running the cars, making repairs and meeting contingencies is very great; and when to this shall be added the interest on debts incurred, little or no profit can be realized to the stockholders for some years after the road is in operation. Lands, of necessity, are often received in payment of stock. These lands are taxed the same as lands held by an individual, on the plausible ground that the lands of a corporation should be taxed the same as the lands of an individual. But these lands are never held by the corporation for the purposes of culture, but to be converted into money, or for the occupancy of the road. They do not, in general, as the lands of an agriculturist, afford a profit by an increase of value. But the corporation is taxed for the lands, and also for the structures made by borrowed capital. This, in effect, is a taxation on borrowed money, and is an addition to the interest. In all enterprises intimately connected with the public interest, such as railroads, banks, etc., which require a large investment of capital, there is no mode of taxation so equal or just as a tax upon the profits. Such investments are subject to many contingencies which do not affect real estate. No estimate can show the expenditure required on a railroad, nor the losses of a bank. As common carriers, the railroad is responsible for injuries done to persons and property,

[1] 6 McLean, 395. See, also, People v. Mayor of Brooklyn, 6 Barb. 209.

through the neglect or want of skill in its agents; and experience has shown that juries are inclined most liberally to compensate all who suffer by finding liberal if not extravagant damages. Banks are liable to imposition and losses, through the failures of borrowers, and counterfeit notes and drafts, which no one can foretell. These casualties place at greater hazard the moneys invested in railroads and banks than in real estate; and although these establishments may be owned by individuals, yet they are so intimately connected with the public interest and welfare, that stockholders are distinguishable from the owners of other property."

SEC. 514. The statutes of the various states usually provide for the levy of general taxes on personalty at the place of residence of the owner, and of real estate in the city or county where located. In the case of ownership of railroad corporations, the place of residence of the corporation within the state, sometimes becomes an important question for the purposes of taxation. For such purposes what is the *situs* of the company? The same question is frequently presented in relation to the jurisdiction of the courts, based upon the residence of the corporate person. In the case of the *Connecticut and Passumpsic Rivers Railroad Company* v. *Cooper*,[1] the Supreme Court of Vermont, by REDFIELD, J., in discussing the question of the *situs* of the company, observe: "We think it safe, as a general rule, to say that a railway company, if it have any place of residence, must be limited to the range of its legally defined route. This is certainly in analogy to all other corporate companies. They are held to have their *situs* or residence where their principal business is transacted. This is so in the case of banks, manufacturing companies, and many others; and, although these companies may, for some purposes, transact business out of the range of their ordinary locality, as they sometimes do even in other states and countries, they are still regarded as having a fixed *situs* at the place where their principal business is done."

[1] 30 Vt. 476.

See, also, The People *v.* Peirce, 31 Barb. 138; Southwestern R. Co. *v.* Paulk, 24 Ga. 356; and the English doctrine in Garton *v.* Great Western R. Co., E. B. & E. 837.

See, also, Sangamon & Morg. R. Co. *v.* County of Morgan, 14 Ill. 163; State *v.* Illinois Cent. R Co., 27 id. 64; Mohawk & Hud. R. Co. *v.* Clute, 4 Paige, 384.

And in New Hampshire it has been held, that if a railroad corporation is located in another State, and all its property is taxed in such State, the same as the property of natural persons, a stockholder in New Hampshire would not be liable to be taxed for his stock in the company.[1]

SEC. 515. **What corporate property is taxable; double taxation.**— The real estate of a corporation is, as we have seen, generally taxable in the localities where it is located, but the personal property at the place of the location of its principal place of business.[2] This is in accordance with the doctrine of general application to natural persons. Natural persons are generally subject to taxation on personalty, at the place of their domicile. But it has been maintained that the capital stock of a corporation cannot be assessed and taxed, and also the real and personal property in which the capital or its proceeds have been invested, unless expressly so provided by statute, as this would be a double taxation. Mr. Cooley, on this subject, observes:

"But the general principle would undoubtedly be that all the property of a corporation, like that of a natural person, would be liable to an *ad valorem* tax, imposed upon property, and that where the term 'citizen' or 'inhabitant,' is used in the revenue laws of the various states, it includes private corporations for pecuniary gain."[3]

SEC. 516. **Corporate property and interests subject to, and exempt from tax.** — It is perhaps a general rule, that the capital stock of a corporation, if taxable at all, is taxable at the place where the principal office or place of business is located;[4] and its real estate, where it

[1] Smith *v.* Exeter, 37 N. H. 556.

Rails, sleepers, bridges, etc., of a railroad corporation, together with the easement in the lands, within the limits of a railroad, are real estate. Providence, etc., R. Co. *v.* Wright, 2 R. I. 459.

See, also, Louisville, etc., R Co. *v.* Commonwealth, 7 B. Monr. 160:

[2] Sangamon, etc., R. Co. *v.* County, 14 Ill. 163; State *v.* Ill. Cent. R. Co., 27 id. 64; Mohawk, etc., R. Co. *v.* Clute, 4 Paige, 384. The principle is the same where the jurisdiction of the court over the person depends upon the question of residence. See Androscoggin, etc., R. Co. *v.* Stevens, 28 Me. 434; Bristol *v.* Chicago, etc., R. Co., 15 Ill. 436; Rhodes *v.* Salem T., etc., R. Co., 98 Mass. 95.

[3] Cooly on Tax; Bangor, etc., R. Co. *v.* Harris, 21 Me. 533. But see Cumberland, etc., R. Co. *v.* Portland, 37 id. 444.

[4] Mohawk, etc., R. Co. *v.* Clute, 4 Paige, 384; *ante*, § , and note 3.

is located.[1] In *Conwell* v. *Town of Connersville*,[2] the supreme court of Indiana held, that a corporation can be taxed in the place where the corporation is located, only upon the corporate property as distinguished from the interests of the individual stockholders therein; and that, as to these interests, they were taxable in the places where the stockholders respectively resided.[3] And it has been held in New Hampshire, that wood, timber, logs and lumber, and other articles or materials, distributed along the line of a railway, for use in the construction and operation of the road, should be treated as a part of the road, and taxed in the same manner.[4]

But, as before observed, corporate taxation, and the place and parties to be taxed, are now usually matters of statutory regulation subject to constitutional provisions, and the decisions in reference to these questions in the various states, are generally on the construction of these statutes and constitutional provisions.

Thus, it has been held, that a general statutory provision, exempting corporate property from taxation, embraced only such property as was essential in the execution of its purposes, and did not cover property held by the corporation, as a mere convenience;[5] that the statute or charter of a railway corporation, exempting its stock from taxation, covers gross income;[6] that where a specific mode of taxation is provided in the charter, this is exclusive of all other modes;[7] that where there is a provision for the payment of a tax on condition, as that the corporation shall pay a certain tax when their net profits shall reach a certain amount, it is exclusive of liability for taxes under other circum-

[1] Carbon Iron Co. *v.* Carbon County, 39 Pa. St. 251. In this case it was held that the tax for state purposes required to be paid at the auditor-general's office, was a tax on the corporate franchise, and not intended as an exemption from ordinary taxation.

[2] 15 Ind. 150.

[3] See, also, McKeen *v.* County of Northampton, 49 Pa. St. 519; Whitesell *v.* Same, id. 526; Bridgeport *v.* Bishop, 33 Conn. 187; Union Bank *v.* State, 9 Yerg. 490.

[4] Fitchburg R. Co. *v.* Prescott, 47 N. H. 62.

[5] In *Pennsylvania*, see Lehigh Co. *v.* Northampton, 8 W. & S. 334; Railway *v.* Berks Co., 6 Pa. St. 70; Carbon Iron Co. *v.* Carbon County, 39 id. 251; Lackawanna Iron Co. *v.* Luzerne County, 42 id. 424. *Massachusetts*, Worcester *v.* Western R. Co., 4 Metc. 564; Meeting House *v.* Lowell, 1 id. 538.

New Jersey, State *v.* Mansfield, 3 N. J. 510; Gardner *v.* State, 1 id. 557.

[6] State *v.* Hood, 15 Rich. L. 177.

[7] New York and Erie R. Co. *v.* Sabin, 26 Pa. St. 242; Iron Bank *v.* Pittsburgh, 37 id. 340.

stances, and that taxes can only be imposed when the condition is fulfilled;[1] that a general exemption of property of the corporation, but subjecting the stock in the hands of stockholders to taxation, exempts the surplus funds and lands of the corporation;[2] that exemption of capital stock, exempts property of the company, necessary to carry on business;[3] that where the charter of a railroad corporation subjects it to certain specified taxation, but exempts it from all further or other taxes or imposts, this exempts the company perpetually from all taxation except that specified;[4] that where a railroad corporation, exempt from taxation, consolidates with another not enjoying that immunity, such property of the consolidated corporation is subject to taxation;[5] and that, where statute provided that a railroad corporation should be exempt from taxation, except that portion of the permanent and fixed works of the company as is within the state, and that as regards such works no greater tax should be levied than in proportion to the general taxes throughout the state at the same time, it was held, that such portion of the fixed works of the company as was within the state was still subject to general taxation for state and county taxes.[6] But in all such cases the exemption may be repealed by the legislature, under a special reservation of the right so to do, or under a general statutory right, to alter or amend charters.[7]

Under the statute of New York, of 1855, which provided that all persons and associations doing business in the state and non-resident thereof, should be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents, it was held that the statute applied to corporations, and that a foreign insurance company was liable on securities, deposited under the requirements of a statute with the comptroller of the state, for the security of the policy-holders of the insurance company.[8]

[1] State v. Minton, 3 Zabr. 529.

[2] State v. Tunis, 3 Zabr. 546.

[3] The Rome R. Co. v. Rome, 14 Ga. 275.

[4] State Bank v. Knoop, 16 How. 386; Woolsey v. Dodge, 6 McLean (C. C.), 142.

[5] Philadelphia & Wilmington R. Co. v. State of Md., 10 How. (U.S.) 376; Baltimore v. Baltimore & O. R. Co., 6 Gill. 288. See, also, In the Delaware Railroad Tax, 18 Wall. 206.

[6] Philadelphia, etc., R. Co. v. Bayless, 2 Gill. 355.

[7] Morris, etc., R. Co. v. Miller, 2 Vroom, 521; Jersey City, etc., R. Co. v. Jersey City, id. 575; Commonwealth v. Fayette County R. Co., 55 Pa. St. 452.

[8] International Life Ins. Co. v. Commissioners of Taxes, 10 Barr, 442.

And under a statute of Massachusetts it was held, that a manufacturing corporation was taxable for its real estate in the place where it was located, but that its personal property about its manufactory should be assessed to the several individual members, they being liable to be taxed for their several shares in such property.[1]

The decisions in these cases are perhaps important only as recognizing the general doctrine that parties should not be twice taxed on the same property; that it cannot be assessed first as the property of the corporation, and, secondly, as the property of the member.[2]

On the subject of taxes on corporations Mr. Cooley observes: "These are imposed in so many forms that an enumeration is difficult. The following may be mentioned: 1. A specific tax on the franchise. 2. A tax on the property by valuation. 3. A tax on the capital stock. 4. A tax on the business done. 5. A tax on dividends or on profits. Sometimes the franchise is taxed and also the capital stock or the property, but to tax the capital stock and also the property in which the capital is invested would be imposing the burden twice on the same property, and, consequently, unjust, if not illegal."[3]

SEC. 517. **Exemption statutes sustained.** — Notwithstanding public policy would seem to disfavor exemption from taxation, statutes providing therefor are, perhaps, generally, held to be legal by the courts.

And if a compensation has been paid to the state for the franchise of a corporation and in lieu of taxes on the franchise, this exempts the franchise from future taxation by the state, but it would not exempt the corporate property from taxation.

On this question the supreme court of the United States say: "A franchise for banking is in every state of the Union recognized

[1] Salem Iron Factory *v.* Danvers, 10 Mass. 514; Amesbury Wollen Man. Co. *v.* Inhabitants of Amesbury, 17 Mass. 461.

[2] See, also, Smith *v.* Burley, 9 N. H. 423; Bank of Cape Fear *v.* Edwards, 5 Ired. 516; Gordon *v.* Baltimore, 5 Gill. 231; Cases of Taxation, 12 G. & J. 117.

[3] Cooley on Taxation, 392. Under a statute of Massachusetts (1864, ch. 208, § 5), it was held that a corporation for making and supplying gas may be taxed in the town or city where it carries on its business, for all excess of the value of its stock over the value of its real estate and machinery otherwise taxable. Commonwealth *v.* Lowell Gas-light Co., 12 Allen, 75. See, also, Same *v.* Hamilton Man. Co., id. 298.

as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed as they are for all other property, for the support of the government."[1]

The general rule is, that a legislative body cannot limit the legislative powers of its successors, and that all laws passed by the one, may be changed or abolished by another; and it is only when the revenue acts of such a body rise to the character of a contract, as where stipulations are made in the charter of a corporation, in relation to taxation of the corporate franchise or property, and which charter is accepted, that the state can be bound thereby. In such cases the provision would constitute a part of the contract, and the corporation would be protected against the imposition of more taxes, under the provision of the constitution of the United States, inhibiting the states from passing any law impairing the obligation of contracts.

Thus, where the incorporating act of a bank required the payment of a tax of twenty-five cents annually, on each share of stock, in lieu of all tax and bonus, this was held to be a contract between the state and the stockholders, and that such stock in the hands of a stockholder was exempt from other taxation.[2]

Taxation, being essential to the maintenance of a government, the right of the legislature as its representative to levy taxes, it has been held by some of the state courts, cannot with safety be abridged or taken away by any stipulation or contract on its part.[3]

But the general doctrine we have stated, is supported by the current of judicial decisions in the states, and by the uniform

[1] Gordon *v.* Appeal Tax Court, 3 How. 133. But see, qualification or limitation of the doctrine, Baltimore *v.* Baltimore R. Co., 6 Gill, 288; Cases of Taxation, 12 Gill & J. 117; State *v.* Powers, 4 N. J. 400; Gordon *v.* The Appeal Tax Court, and Cheston *v.* Same, 3 How. (U. S.) 133; Branch State Bank *v.* Knoop, 16 id. 386; Jefferson, etc., Bank *v.* Skelly, 1 Black, 436; Hardy *v.* Waltham, 7 Pick. 108.

[2] Johnson *v.* Commonwealth of Ky., 7 Dana, 338; Central R., etc., *v.* Georgia, 2 Otto (U. S.), 665. See, also, same doctrine in Bank of Ill. *v.* The People, 4 Scam. 304; Home of the Friendless *v.* Rouse, 8 Wall. 430; McGee *v.* Mathis, 4 id. 143; Gordon *v.* The Appeal Tax Court, 3 How. (U. S.) 133; Pacific R. Co. *v.* Maguire, 20 id. 36. But see Trask *v.* Maguire, 18 id. 391.

[3] Brewster *v.* Hough, 10 N. H. 138, Mott *v.* Penn. R. Co., 30 Pa. St. 9; Sandusky Bank *v.* Wilbor, 7 Ohio St. 481; Skelly *v.* Jefferson Branch Bank, 9 Ohio St. 606. But see Iron City Bank *v.* Pittsburg, 37 Pa. St. 340.

decisions of the Federal courts.[1] In *Home of the Friendless* v. *Rouse*,[2] the question presented to the supreme court of the United States was, whether a statute to incorporate a charitable institution, and declaring that the property of the corporation should be exempt from taxation, and that a statutory provision existing at the time, that every charter of incorporation should be subject to alteration, suspension, or repeal, at the discretion of the legislature, should not apply to such corporation, became, after the corporation had organized under such act, such a contract as prevented the state from subsequently imposing taxes upon it, and whether a statute, afterward passed by the legislature taxing its corporate property, was a violation of the contract, and, therefore, void.

The court say: —

"The validity of this contract is questioned at the bar, on the ground that the legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court that a state may, by contract based upon a consideration, exempt the property of an individual or corporation from taxation either for a specified period or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the state if the charter containing it is accepted."[3]

The doctrine of exemption by virtue of provisions contained in a charter, was extended by the supreme court of the United States in *Washington University* v. *Rouse*.[4] In this case, a charter was

[1] But in McCulloch *v.* State of Maryland, 4 Wheat. 316, MARSHALL, C. J., in his opinion, maintains that the general doctrine of exemption did not prohibit states from taxing the real property of the Bank of the United States, in common with other real property within the state, nor the interests which a citizen of the state may hold in the bank, in common with other property of the same character through the state. But it was subsequently held in Weston *v.* The City of Charleston, 2 Pet. (U. S.) 449, that owners of government stock of the United States were not liable to state taxation upon the stock.

[2] 8 Wall. 430.

[3] See, also, New Jersey *v.* Wilson, 7 Cranch, 164; Gordon *v.* Appeal Tax Court, 3 How. 133; Piqua Bank *v.* Knoop, 16 id. 369; Ohio L. & T. Co. *v.* Debolt, id. 416; Dodge *v.* Woolsey, 18 id. 331; Mechanics and Traders' Bank *v.* Thomas, id. 384; Mechanics and Traders' Bank *v.* Debolt, id. 380; McGee *v.* Mathis, 4 Wall. 143.

[4] 8 Wall. 439.

See, also, Jefferson *v.* Skelly, 1 Black. 436; Illinois Cent. R. Co. *v.* County, 17 Ill. 291; O'Donnell *v.* Bailey, 24 Miss 386; Seymour *v.* Hartford, 21 Conn. 481.

But exemptions are temporary

granted by the legislature of Missouri to the Washington University, as an institution of learning. The court was divided in this case as well as the case from which we have just quoted from the opinion. Mr. Justice DAVIS, in delivering the opinion, refers to the two cases, and says: "The object of the charter in the one case was to promote a charity, in the other, to encourage learning. Both were public objects of advantage to the country, and which every government is desirous of promoting. Whether the endowment of a charity is of more concern to the state than the endowment of a university for learning, is within the power of the legislature to determine. If the legislature has acted in a manner to show that it considered the objects equally worthy of favor, it is not the province of this court to pass on the wisdom of the measure."

But these cases were decided by a divided court, CHASE, C. J., and MILLER and FIELD, JJ., dissenting.[1] The dissenting opinion by Mr. Justice MILLER maintains the general doctrine of the inviolability of contracts made between a state and its citizens, where it is within the scope of the power of the state to act in the matter, and the contract is not against general public policy. But he held that a legislative body, sitting under a state constitution of the usual character, had no right to sell, give, or bargain away forever, the taxing power of the state; that this power is absolutely essential to the perpetuity of the government; that no civilized government has ever existed that did not depend upon taxation in some form for the continuance of its existence; and that to allow legislators to deprive the state forever, of the power of taxation, would render it possible for them to destroy the government they were appointed to serve.[2]

unless contained in the charter. Southern R. Co. v. City of Jackson, 38 Miss. 334; Ohio Trust Co. v. Debolt, 16 How. (U. S.) 416; Christ's Church v. Philadelphia, 24 id. 300. Under a general exemption of corporate property from taxation, corporate stock in the hands of stockholders is exempt. Gordon v. Appeal Tax Court, 3 How. (U. S.) 133. So is the franchise. Wilmington R. Co. v. Reid, 13 Wall. 264. And an exemption for a term of years is valid. Raleigh, etc., R. Co. v. Reid, id. 269.

[1] And in the Delaware Railroad Tax, 18 Wall. 206, it was held that an act of the legislature, consolidating two railroads, which provided that the new corporation should pay a certain tax annually to the state, did not amount to a contract so as to prevent a subsequent legislature from imposing a further and a different tax.

[2] The argument against the power of the legislatures to exempt property perpetually from taxation, in any case,

If the question was an open one, there would be little doubt that the enlightened judicial mind, seeing the danger to the permanency of governments, by contracts, which take from them the right of taxation, would declare such contracts void as

is so well presented by the learned judge that I insert it in this note. He says: "It is the settled doctrine of this court that it will, in every case affecting personal rights, where, by the course of judicial proceedings, the matter is properly presented, decide whether a state law impairs the obligation of contracts; and if it does, will declare such law ineffectual for that purpose. And it is also settled beyond controversy that the state legislatures may, by the enactment of statutes, make contracts which they cannot impair by any subsequent statutes.

"It may be conceded that such contracts are so far protected by the provisions of the federal constitution that even a change in the fundamental law of the state, by the adoption of a new constitution, cannot impair them, though provisions to that effect are incorporated in the new constitution. We are also free to admit that one of the most beneficial provisions of the Federal constitution, intended to secure private rights, is the one which protects contracts from the invasion of state legislation. And that the manner in which this court has sustained the contracts of individuals, has done much to restrain the state legislatures, when urged by the pressure of popular discontent, under the sufferings of great financial disturbances, from unwise as well as unjust legislation.

"In this class of cases, when the validity of the contract is clear, and the infringement of it by the legislature of a state is also clear, the duty of this court is equally plain.

"But we must be permitted to say that in deciding the first of these propositions, namely, the validity of the contract, this court has in our judgment been at times quick to discover a contract that might be protected, and slow to perceive that what are claimed to be contracts were not so, by reason of the want of authority in those who profess to bind others. This has been especially apparent in regard to contracts made by the legislatures of states, and by those municipal bodies to whom, in a limited measure, some of the legislative function has been confided.

"In all such cases, where the validity of the contract has been denied, the question of the power of the legislative body to make it, necessarily arises; for such bodies are but the agents and representatives of the greater political body—the people, who are benefited or injured by such contracts, and who must pay, when any thing is to be paid, in such cases.

"That every contract fairly made ought to be performed is a proposition which lies at the basis of judicial education, and is one of the strong desires of every well-organized judicial mind. That, under the influence of this feeling, this court may have failed in some instances to examine, with a judgment fully open to the question, into the power of such agents, is to be regretted, but the error must be attributed to one of those failings which leans to virtue's side.

"In our judgment, the decisions of this court, relied upon as conclusive of these cases, belong to the class of errors which we have described.

"We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away forever, the taxing power of the state. This is a power which, in modern and political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal services from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are

against public policy, and the security and existence of the government, which is paramount to every other political or social object. No agent or representative of the sovereign authority should be permitted, in any manner, to contract or stipulate to suspend perpetually so important a function of government. If the power is recognized in any case, it may be extended to divest the government of all power in this respect; and this possibility is a sufficient reason for denying the power in any case.

SEC. 518. **Indications that the doctrine will not be extended.** — After the many protests, against the doctrine of exemption of corporations for pecuniary gain from taxation, based upon the stipulations contained in charters, or general statutes providing for their incorporation, there seems to be a disposition of some of the courts to limit rather than extend it.

In a recent case in the supreme court of the United States the facts were as follows: —

The act of incorporation of a railroad company exempted the capital stock of the company, and further provided that the works, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances of the company, should be exempt from tax-

appointed to serve, and that their action in that regard is strictly lawful.

"It cannot be maintained that this power to bargain away for an unlimited time the right of taxation, if it exists at all, is limited in reference to the subjects of taxation. In all the discussions of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can as well exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men, making contracts with legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from the burdens of supporting the government.

"The result of such a principle, under the growing tendency to special and partial legislation, would be to exempt the rich from taxation, and cast all the burden of the support of the government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity.

"With as full respect for the authority of former decisions, as belongs from teaching and habit to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

ation for ten years after the completion of the road within the limits of the state. The company was also authorized to borrow, from time to time, such sums of money as might be required to construct the road, and to execute bonds and mortgages therefor on the property and franchise of the road. By virtue of such authority money was borrowed and mortgage bonds given therefor; and the company having failed to pay its bonds, held by the plaintiff, judgment was obtained thereon, and a foreclosure of the mortgage was had, and the property and franchise were sold to satisfy the same, and purchased by the plaintiff in error. This action was brought by the state of Louisiana against the purchaser to recover certain taxes.

The question presented was, whether, under the circumstances, the property and franchise was exempt from taxation. The court held, that immunity from taxation did not accompany the property in its transfer to the purchaser; that exemption in such cases was a personal privilege; that the franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, such as to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and without which its road and works would be of little value; but, that immunity from taxation was not itself a franchise of a railroad corporation which passes as such to a purchaser of its property.[1] Mr. Justice FIELD, in delivering the opinion of the court, observes: "The question presented is, whether, under the designation of franchise, the immunity from taxation upon its property possessed by the railroad company accompanied the property, in its transfer to the defendant, and whether that immunity was a mere personal privilege of the company, and, therefore, not transferable to others? The supreme court of the state took the latter view, and held that the exemption did not attach to the property of the corporation so as to follow it into the hands of third parties. In this view we agree with the state court. The greater part of the property outside of the capital stock was liable to constant waste, deterioration and destruction, and, according to the ordinary course of business, would be disposed of by the company as new works were required. It can

[1] Morgan v. Louisiana, 3 Otto (U.S.), 217.

hardly be supposed that the legislature intended that the exemption should follow the fixtures and vehicles of the company after they had passed out of its control, so that, wherever found, the power of taxation could not touch them; or that workshops and warehouses, ceasing to be the property of the company, should carry to its subsequent possessors a privilege intended only for the benefit of the corporation. The language of the statute requires no such construction, and intendments will not be indulged to enlarge the operation of a clause restraining the exercise of a sovereign attribute of a state."[1]

In Illinois, where it was provided, in a general act for the incorporation of banks, for the assessment of taxes in a certain way, this was held not to be a contract on the part of the government with the corporations organized under it, so as to prevent the mode of assessment from being changed by subsequent legislation.[2]

So, where the legislature of South Carolina, in 1851, chartered a railroad company, but did not exempt its property from taxation, but in 1855 amended the charter, in which it exempted its property from taxation, and in 1863 it passed an act, conferring all the powers, rights, and privileges formerly granted to such company, to another corporation, which had been incorporated in 1849 to build a railroad, it was held by the supreme court of the United States, that the act of 1863 exempted the last-named road from taxation, and that the legislature could not repeal such act so as to subject it to taxation.[3]

In this case the court observed: —

"It is said that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity,

[1] See, also, The Delaware Railroad Tax, 18 Wall. 206.

[2] Bank of the Republic *v.* County of Hamilton, 21 Ill. 53.

[3] Humphrey *v.* Pegues, 16 Wall. 244. But where an act of the legislature provided that the real property of an existing hospital should be thereafter exempt from taxes, and this was repealed by a subsequent act, the last act was held to be constitutional. Christ's Church *v.* Philadelphia, 24 How. 300; 24 Pa. St. 229.

And where the statute of a state offered a premium of ten cents a bushel on every bushel of salt, made from water obtained by boring within the state, and exemption from taxation of the land used for such purposes, it was held, that it was not an irrevocable contract, but a mere act of general legislation, and that it could be repealed at the will of the legislature, even after parties relying upon the provisions of the act had entered upon the business, which it was the purpose of the act to encourage. Salt Co. *v.* East Saginaw, 13 Wall. 373.

without which the state must cease to exist; and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is too late to raise this question in this court. It has been held that the legislature has power to bind the state in relinquishing its power to tax a corporation. It has been held that such a provision in the charter of a incorporation constitutes a contract, which the state may not subsequently impair."[1]

SEC. 519. **Where corporate property is used in different states.**—It is common for corporate property to be used for corporate purposes, in two or more states, and the question has arisen in such cases as to the place where it should be assessed and taxes be levied and collected. If it is subject to taxation for general purposes in more than one place, the corporation owning it would be subject to an unequal and unjust burden, which the law should not allow. This question was recently presented to the supreme court of the United States, in the case of *St. Louis* v. *The Ferry Co.*[2]

The defendants were a corporation organized under the laws of Illinois, and their ferry boats ran from that state across the Mississippi river to St. Louis, remaining there only a short time each trip; and the question was whether the city of St. Louis, by virtue of a statute of the state, authorizing the city to tax all property within it, could tax such property. The supreme court of the United States held, that the defendants were not liable to taxation in St. Louis, although the boats were enrolled in that city in pursuance of the navigation acts, and the company had an office there, and the principal officers lived there, and the directors held their meetings there, and the corporate seal was kept there. The court say: —

"In the jurisprudence of the United States, a corporation is regarded as in effect a citizen of the state which created it. It has no faculty to migrate. It can exercise its franchises extra-territorially, only, so far as may be permitted by the policy or comity of other states. * * * When there is jurisdiction of neither

[1] See, also, Providence Bank *v.* Billings, 4 Pet. 514; Dartmouth College *v.* Woodward, 4 Wheat. 518; The Binghamton Bridge, 3 Wall. 51.

[2] 11 Wall. 423.

the person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a state should enact that the citizens or the property of another state or country should be taxed in the same manner as the persons and property within its own limits, and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity, as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation, as to valid judicial action."

SEC. 520. **Exemption of United States stocks, etc.**—Within the scope of the powers conferred upon congress, by the provisions of the Federal constitution, the acts of congress are the supreme law of the land, and with the exercise of such express powers as are conferred upon that body, or such as are incidental to the proper execution of such powers, the legislatures of the several states have no right to interfere. Under the powers thus conferred upon congress they possess the exclusive right of legislation in relation to various matters within even the territorial limits of the states.

In *McCulloch* v. *State of Maryland*,[1] it was observed by Chief Justice MARSHALL, in relation to this subject, as follows:

"If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to do so.

"But the question is not left to mere reason; the people have in express terms decided it, by saying: 'the constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land,' and by requiring that the members of the state legislatures and the officers of the executive and legislative departments of the states shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme, and its laws when made in pursuance of the con-

[1] 4 Wheat. 316.

stitution form the supreme law of the land, 'any thing in the constitutions or laws of the states to the contrary notwithstanding.'

"Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument, which, like the articles of confederation, excludes incidental or implied powers, and which requires that every thing granted shall be expressly and minutely described. * * * It cannot be denied that the powers given to the government imply the ordinary means of execution. That, for example, the power of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. * * * The government which has a right to do an act and has had imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. * * *

"After the most deliberate consideration it is the unanimous and decided opinion of the court that the act to incorporate the bank of the United States is a law made in pursuance of the constitution and is a part of the supreme law of the land. The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object are equally constitutional. * * * That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power is admitted. The states are expressly forbidden to lay any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded — if it may restrain a state from the exercise of its taxing power on imports and exports, the same par-

amount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as in its nature incompatible with, and repugnant to, the constitutional laws of the Union. * * *

"That the power of taxing it [the bank] by the states may be so exercised as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it.

"But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument is a question of construction. In making this construction no principle, not declared, can be admissible, which would defeat the legitimate operations of the supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. * * *

"The people of a state give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard them against its abuse.

"But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all for the benefit of all, and upon theory, should be subjected to that government only, which belongs to all." [1]

[1] See, also, Weston v. City of Charleston, 2 Pet. 449; Osborn v. United States Bank, 9 Wheat. 732; Bank of Commerce v. New York City, 2 Black. 620.

In the case of *Bank of Commerce* v. *New York City*,[1] the question involved was whether the stock of the United States, constituting most of the capital stock of the bank, incorporated under the laws of New York, was subject to a tax according to its value, under the revenue laws of that state. On this question Mr. Justice NELSON, after referring to various authorities bearing upon the question and sustaining exemption in such cases, observes:

"The conclusive answer to the attempted exercise of state authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which it is admitted, it is supreme. That government whose powers, executive, legislative or judicial, whether it is a government of enumerated powers like this one or not, are subject to another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and vital functions of the general government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But what avail is the function or the means, if another government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, 'it is a right which in its nature acknowledges no limits.' And the principle is equally true of every power or function of a government subject to the power or control of another."

It will be apparent that it is difficult, in the somewhat complicated structure of our state and national governments, to fix the exact boundary line between the two; and this question of taxation has been one of the prolific sources of embarrassment in this respect. Their powers are so closely and intimately

[1] 2 Black. (U. S.) 620.

related, that where the limits of the one is fixed the other ends, and the whole complicated structure may become harmonious, only, by application of the fundamental principle that each is sovereign and independent within the proper sphere and scope of its powers, and may exercise the functions of sovereignty as provided by the Federal constitution, in the one case, and subject only to the limitations of the constitutions of the respective states, and of the Federal constitution, in the other.

SEC. 521. **Exemption from taxation under the National Banking Law.**— The National Banking Law, on the subject of taxation, provides as follows: —

"SEC. 5214. In lieu of all existing taxes, every association shall pay to the treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year upon the average amount of notes in circulation, and a duty of one-quarter of one per centum, each half-year, upon the average amount of its deposits, and a duty of one-quarter of one per centum, each half-year, on the average amount of its capital stock, beyond the amount invested in United States bonds. * * *

"SEC. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking associations owned by non-residents of any state, shall be taxed in the city or town where the bank is located, and not elsewhere.

Nothing herein contained shall be construed to exempt the real property of associations from either state, county, or muni-

cipal taxes, to the same extent, according to its value, as other real property is taxed." [1]

Under the foregoing provisions it was held, in *Van Allen* v. *The Assessors*,[2] that the shares of banking associations, organized under said act and in the hands of the shareholders, were subject to taxation by the state in which the association is formed, subject to the restrictions mentioned, although the whole capital of such association may be vested in national securities, which are declared by an act of Congress to be "exempt from taxation by or under state authority." [3]

SEC. 522. **Municipal subscriptions in aid of corporate enterprises and taxation therefor.** — According to many authorities, the public interest is so much identified with railroad and other corporate enterprises, as to authorize a subscription of towns, cities or counties, to the corporate stock, by virtue of a power conferred upon them by statute, especially where such roads are constructed through, or such enterprises are organized and carried on within, such towns, cities or counties.[4] Subscriptions made by the proper agents of such towns, cities or counties, duly authorized therefor, have, perhaps, usually been held binding upon the municipal corporations whom they represent; and if the authority to make such subscriptions on the part of such corporations exists, it would be the manifest duty of the proper authorities, in the absence of other provisions, to levy and collect a special tax for the purpose

[1] Rev. Stat. U. S. 1874; Act June 3, 1864.

[2] 3 Wall. 573.

[3] See, also, the same doctrine in Lionberger *v.* Rouse, 9 id. 468; National Bank *v.* Commonwealth, id. 353; Mintzer *v.* County of Montgomery, 54 Pa. St. 139; Monroe Co. Sav. Bank *v.* Rochester, 37 N. Y. 365; Society, etc., *v.* Coite, 6 Wall. 594; Provident Inst. *v.* Massachusetts, id. 611. But see Bank Tax Case, 2 Wall. 200. United States certificates of indebtedness, under the act of March 1, 1862, are not exempt from taxation. People *v.* Hoffman, 37 N. H. 9. And under the act of February 25, 1862, legal tender notes are not exempt. People *v.* Board of Supervisors, 37 N. Y. 21.

[4] Sharpless *v.* The Mayor of Philadelphia, 21 Pa. St. 147; Moers *v.* The City of Reading, id. 188; Cincinnati, etc., R. Co. *v.* Commissioners, 1 Ohio (N. S.), 77; Cass *v.* Dillon, 2 id. 607; New Orleans, etc., R. Co. *v.* Succession, etc., 8 La. Ann. 341; Slack *v.* Maysville, etc., R. Co., 13 B. Monr. 1; Covington, etc., R. Co. *v.* Kenton Co. Ct., 12 id. 144; Talbot *v.* Dent, 9 id. 526; Justices, etc., *v.* Turnpike Co., 11 id. 145; Shaw *v.* Dennis, 5 Gilm. 405; People *v.* Mayor, etc., 4 N. Y. 419; Bridgeport *v.* Housatonic R. Co., 15 Conn. 475; Stein *v.* City of Mobile, 24 Ala. 591; Nichol *v.* Nashville, 9 Humph. 252; Augusta Bank *v.* Augusta, 49 Me. 507; Parker *v.* Scogin, 11 La. Ann. 629; Dill. on Mun. Corp., § 104.

of meeting such obligations. But, on this subject, there has been a great diversity of views and decisions, and in the same states, the decisions have fluctuated.[1]

Mr. Redfield, on this subject, observes: "It is not now important to discuss the principle of these conflicting decisions, since the tide of judicial opinion is almost all in one direction and not in concurrence with the latter determinations. For ourselves, we are free to confess that we could never comprehend the basis upon which so many able jurists in this country have professed to perceive clearly, the reason for giving municipal corporations the power to become stockholders in railway companies. We have always felt that it was one of those cases in jurisprudence, where the wish was father to the thought."[2]

And Mr. Dillon says: "The most noted of extraordinary powers conferred upon municipal corporations is the authority to aid in the construction of railways by subscription to their stock, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind had its origin within a period comparatively recent, and has been more or less resorted to, at times, by almost every state in the Union. As it is the author's duty, in a work of this character, to state what the law is, rather than what, in his judgment, it ought to be, he feels constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the states, has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through them. * * * Notwithstanding the opinion of so many learned and eminent judges, there remain serious doubts as to the soundness of the principle, viewed simply as one of constitutional law. Regarded in the light of its effects, however, there is little hesitation in affirming that this invention

[1] See, against this doctrine, Stokes v. County of Scott, 10 Ia. 166; State of Iowa v. County of Wapello, 13 id. 388; Griffith v. Commissioners, etc., 20 Ohio, 609; Pennsylvania R. Co. v. City of Philadelphia, 47 Pa. St. 189; Taylor v. Newberne, 2 Jones' Eq. 141; St. Louis v. Alexander, 23 Mo. 483; Thorpe v. Rutland, etc., R. Co., 27 Vt. 140; Thomson v. Lee County, 3 Wall. 327. The contrary authorities will be cited hereafter.

[2] 1 Redf. on Rail., § 230, note 1.

to aid the enterprises of private corporations, has proved itself baneful in the last degree."[1]

Notwithstanding the reasons adduced against the doctrine, based upon fundamental principles of the law, the authorities have constantly been multiplying in support of the right of municipal corporations to subscribe for the stock, and thereby aid in the construction of railroads and other corporate enterprises.

"The tide rolls on with the general approbation, and the only hope now is to be able to fix such limits to railway extension, by means of municipal aid, that the entire property of the country may not be thrown into public and official administration by means of the unlimited power of extension of taxation."[2]

Where there is no special constitutional limitation on the subject, and authority is conferred for this purpose, on the town, city, or county, it seems settled by at least the greatest number of authorities, that they may subscribe for railroad or other corporate stock, borrow money to pay for the same, and levy a tax to pay the subscription or repay the loan; and that this authority may be exercised without a submission of the matter to the citizens, or an approval of the same by a popular vote.[3]

The consideration of this question in this connection, is pertinent and important only, as it involves the question of taxation. It is evident that if a municipal corporation may subscribe for, or borrow money to pay a subscription to, a railroad or other private

[1] Dill on Mun. Corp., § 104.

[2] 1 Redf. on Railw., § 230.

See, however, recent decisions against the legality of municipal aid in such cases. Fisk *v.* City of Kenosha, 26 Wis. 23; English *v.* Chicot Co., 26 Ark. 454; Hanson *v.* Vernon, 27 Ia. 28; Whiting *v.* Sheboygan R. Co., 25 Wis. 167; People *v.* Salem, 20 Mich. 452; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; State *v.* Conlin, id. 318; Lincoln *v.* Smith, id. 328; State *v.* Parker, 26 id. 357; Walker *v.* City of Cincinnati, 21 Ohio St. 14; Beckel *v.* Union Tp., 15 Ohio St. 437.

[3] In addition to the authorities already cited in support of this view, see, also, Thomson *v.* Lee County, 3 Wall. 327; Buty *v.* City of Muscatine, 8 id. 575; Pendleton *v.* Amy, 13 id. 297, where it was also held, that long acquiescence in the validity of bonds issued by a municipal corporation, would raise a presumption that there was a compliance with the requisite formalities in issuing them.

See, also, the same general doctrine in New York. People *v.* Mitchell, 35 N. Y. 551; White *v.* Syracuse & U. Q. Co., 14 Barb. 559; Copes *v.* Charlestown, 10 Rich. (S. C.) 491; Clark *v.* City of Rochester, 24 Barb. 446; Grant *v.* Courter, 24 id. 232; Benson *v.* Mayor of Albany, 24 id. 248; Starin *v.* Genoa, 23 N. Y. 439; Winn *v.* Macon, 21 Ga. 275, where it was held that the legislature might ratify a subscription made without authority. And the same doctrine was held in Butler *v.* Dunham, 27 Ill. 474, and Commonwealth *v.* Perkins. 43 Pa. St. 400.

corporation, the money requisite to liquidate such indebtedness must be raised in the usual way, by a levy and collection of taxes, therefor. And such levy and collection would not only be a duty imposed upon the proper officers of the corporation, but the obligation in this respect could be enforced by mandamus.[1]

[1] State v. City of Davenport, 12 Ia. 335; Von Hoffman v. City of Quincy, 4 Wall. 535; Supervisors v. United States, id. 435; City of Galena v. Amy, 5 id. 705; Butz v. City of Muscatine, 8 id. 575: Mayor v. Lord, 9 id. 409. See Mandamus.

CHAPTER XXIII.

NEGLIGENCE AND WRONGFUL ACTS OF AGENTS OR SERVANTS.

SEC. 524. **Corporate liability for negligence and wrongful acts of agents or servants.**— A corporation being an artificial person must necessarily discharge its functions through agents and servants, and as a result, is necessarily and justly held chargeable for the *manner* in which their duties are discharged. It is liable for the negligent or tortious acts of its servants or agents within the scope of their authority, upon the same grounds, in the same manner and to the same extent as an individual, and that, too, without any reference to the objects or purposes for which it was established or the powers conferred or restrictions imposed upon it by law. The defense of ultra vires does not generally apply in cases of tort.[1] The law never authorizes an unlawful act. A corporation has no authority from its charter or from the general law to publish

[1] "Corporations," says the court in Bissell *v.* Southern, etc., R. R. Co., 22 N. Y. 258, "like natural persons have the capacity to do wrong; *and when, in their dealings, they break over the restraint imposed upon them, an exemption from liability cannot be claimed on the mere ground that they have no power to act.*" Green *v.* London, etc., Omnibus Co., 7 C. B. (N. S.) 290; Limpus *v.* General Omnibus Co., 1 H. & C. 528. Where a corporation intrusts an agent with a duty that does or *may* involve the use of force and personal violence to others, if the servant, in the discharge of such duty, goes beyond the proper limits in its use, the corporation is answerable for the consequences. Hewett *v.* Swift, 3 Allen (Mass.), 420; Moore *v.* Fitchburgh R. Co., *ante.* So where the act *may* result in a nuisance. Rex *v.* Medley, *ante;* Ellis *v.* Sheffield Gas Co., 18 Jur. 146. The liability of a corporation for the wrongful acts of its agents stands upon the same ground as that of a natural person, and it is liable for the consequences of wrongful acts committed by them, within the scope of their authority, however foreign to its nature, or however much the same may be in excess of its granted powers. N. Y. & New Haven R. Co. *v.* Schuyler, 34 N. Y. 30; Kneass *v.* Schuylkill Bank, 4 Wash. (U. S. C. C.) 9; Goodspeed *v.* East Haddam Bank, 22 Conn. 530. The ground upon which this liability is predicated is, that, as a corporation necessarily acts by agents, by committing *any* authority to them, it must be made chargeable for any abuse of the power so intrusted to them, rather than an innocent party, nowise in fault. Thus, where the officers of a corporation issue fraudulent stock and permit its transfer, it is liable to the party receiving such stock, precisely the same as it would be if the stock was genuine. *The transaction is fraudulent* and is the cause of the injury and the basis of recovery. The court under such circumstances will not hear the party upon its assertion that the act is ultra vires. N. Y. & N. H. R. Co. *v.* Schuyler, *ante;* Aldrich *v.* Press Printing Co., 9 Minn. 133; Whitfield *v.* S. E. R. Co., 31 L. T. 113; Terre Haute Gas Co. *v.* Teel, 20 Ind. 131; Taylor *v.* Boston Water Power Co., 12 Gray (Mass.), 415; Moore *v.* Fitchburgh R. Co., 4 id. 465; St. Louis, etc., R. Co. *v.* Dalby, 19 Ill. 353; Foote *v.* Cincinnati, 9 Ohio, 31; Duncan *v.* Surrey Canal, 3 Starkie, 50; Stevens *v.* Boston, etc., R. Co., 1 Gray (Mass.), 277; Rex *v.* Medley, 6 C. & P. 292; State *v.* Vt. Cent. R. Co., 27 Vt. 103; Hewett *v.* Swift, 3 Allen (Mass.), 420; Thayer *v.* Boston,

a libel, to commit an assault, or to erect or maintain a nuisance, yet it may, through its servants or agents, commit these, as well as other offenses, and be answerable therefor, either civilly or criminally, the same as an individual would be.[1] They are liable for the *torts* of their agents as well as for their contracts,[2] but in order to establish a ground of recovery the act must be one that was within the scope of the authority of such agent or servant.[3]

SEC. 525. **Illustration of the rule.** — Thus, if an agent of the corporation commits an assault, unless it was fairly within the scope of his duty, the corporation cannot be held chargeable therefor, as where an officer of a bank assaults a person who goes there upon business;[4] but if the duty committed to the agent was such that the assault was an incident thereof, that is, if it was committed in the discharge of such duty and in furtherance thereof, the corporation is liable therefor the same as an individual would be. Thus, a railroad company, by placing a conductor in charge of a train of cars to collect fares, is liable for an assault committed by him or by his direction in discharging that duty, even though the act is ill-advised, unnecessary and entirely unlawful.[5]

19 Pick. (Mass.) 511; Thatcher *v.* Bank, 5 Sandf. (N. Y.) 121; Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 485; Edwards *v.* Union Bank, 1 Fla. 136; Lyman *v.* White River Bridge Co., 2 Aiken (Vt.), 255; Whiteman *v.* R. Co., 2 Harr. (Del.) 514; Underwood *v.* Newport Lyceum, 5 B. Monr. (Ky.) 129.

[1] First Baptist Church *v.* Schenectady, etc., R. R. Co., 5 Barb. (N. Y.) 79; Rhodes *v.* Cleveland, 10 Ohio, 159; Thompson *v.* New Orleans & Carrolton Co., 10 La. Ann. 403; Little Miami R. R. Co. *v.* Stevens, 20 Ohio, 415.

[2] Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 485; Hawkins *v.* Dutchess, etc., Steamboat Co., 2 Wend. (N. Y.) 452; Lyman *v.* White River Bridge Co., 2 Aik. (Vt.) 255; Moore *v.* Fitchburgh R. R. Co., 5 Gray (Mass.), 465.

[3] Orr *v.* Bank of United States, 1 Ohio, 36.

[4] Orr *v.* Bank, *ante.*

[5] Wood's Law of Master and Servant, 548–580. In Ramsden *v.* Boston & Albany R. Co., 104 Mass. 117; 6 Am. Rep. 117, the female plaintiff was a passenger upon the defendants' railroad, and upon being called upon for her fare paid it to the conductor. Soon after he called upon her again for her fare, and she declined to pay him, informing him that she had already paid it to him. This the conductor denied, and used very abusive and insulting language to her, and demanded that she should give him her parasol to keep as security for her

SEC. 526. **The maxim, qui facit per alium facit per se, specially applicable to corporations.** — The rule is, that "when a person puts another in his place to do certain acts in his absence, he necessarily leaves him to determine for himself, according to his judgment and discretion, according to circumstances and exigencies that may arise, when and how the act is to be done, and trusts him for its proper execution; consequently he is liable for the wrongful execution of the act, both in the manner and occasion of doing it, provided it is done *bona fide* in the prosecution of his business and within the scope of the servant's express or implied authority, and not from mere caprice and wantonness, and wholly

fare, which she refused to do, and the conductor thereupon took hold of the parasol and forcibly wrenched it from her possession. The lower court held, as a matter of law, that no recovery could be had, because no authority, express or implied, existed on the part of the conductor to seize the property of a passenger for the payment of fare. But, upon appeal, this ruling was reversed, GRAY, J., remarking: "The use of unwarrantable violence in attempting to collect fare of the plaintiff was as much within the scope of the conductor's employment as the exercise or threat of unjustifiable force in ejecting a passenger from the cars. Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling payment of fare. Either is an unlawful assault; but, if committed in the exercise of the general power vested by the corporation in the conductor, the corporation as well as the conductor is liable to the party injured."

In another case, Holmes *v.* Wakefield *et al.*, 12 Allen (Mass.), 580, it was held that even though the plaintiff was a trespasser at the time when the injury was inflicted, yet, if in ejecting him from the train the conductor uses more force than is reasonable or necessary to accomplish his removal, or removes him under improper circumstances, the company would be liable for the injury. Thus, in this case, the plaintiff got upon a freight train, and, after it had started, the conductor told him to get off. The plaintiff offered to pay his fare, but the conductor declined to receive it, and, while the train was in motion, gave him a push, so that to save himself he had to jump, and thus was seriously injured. It appeared that the company had issued printed instructions as follows: "The conductor will not allow any person to ride in any freight car attached to their train," of which instruction the conductor was aware; and this was the only authority or instruction under which the conductor acted. The court held that the company were liable for the injury.

In an Indiana case (Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116) it appeared that, by a regulation of the defendant — a railroad company — an additional sum was charged of passengers who had not procured tickets before entering the cars. The plaintiff applied at the ticket office of defendant for a ticket to C., but, without fault on his part, failed to procure it. On the cars he informed the conductor of his attempt to procure a ticket, and tendered the sum required to purchase a ticket. The conductor demanded an additional sum, which the plaintiff refused to pay. The conductor thereupon ejected him from the car, and the court held that the defendants were not only liable for the injury, but that, if the jury found that the act was done through "oppressive malice or wantonness," exemplary damages might be given, and a verdict for $1,000, under the circumstances, was held not excessive.

outside the duties imposed upon him by the master."[1] And this rule applies with equal, even more force, to corporations that in the very nature of things must act through employees, and extends to every agent employed, from the highest to the lowest, the simple test of liability being, whether the act was done in the discharge of a duty committed to such agent by the corporation and within the scope of his authority, express or implied.[2]

SEC. 527. **Cases illustrating the maxim.** — In *Limpus* v. *General Omnibus Company*, it was held, that the driver of an omnibus, employed to pick up passengers for a corporation, who drove his horses against a rival coach in order to obtain passengers, was treated as doing an act within the scope of his authority, although he had been expressly directed *not to do such an act.*[3] The defendants had given instructions to their driver not to obstruct any omnibus. It was contended upon the hearing in the Exchequer Chamber that no recovery could be had, because the act was *willfully and purposely* done by the servant in direct disobedience of the master's orders, and Mellish, in his argument for the defendants, contended, upon the authority of *Croft* v. *Alison* (4 B. & Ald. 590), that no recovery could be had because the driver was pursuing a purpose of his own, and not his master's business, when he did the act complained of, and cited the rule laid down in the case last referred to, viz.: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another and produces the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." WILLIAMS, J., interrupting the counsel, said: "If a driver, in a moment of passion, vindictively strikes a horse with a whip, that would not be an act done in the course of his employment; but in this case

[1] Wood's Law of Master and Servant, 562; Weed *v.* Panama R. Co.

[2] Wood's Law of Master and Servant, 562 *et seq.*

[3] Limpus *v.* General Omnibus Co., 1 H. & C. 528. See, also, S. P. Green *v.* London Omnibus Co., 7 C. B. (N. S.) 290; Goff *v.* Great Northern R. Co., 3 El. & El. 672.

the servant was pursuing the purpose for which he was employed, viz., to drive the master's omnibus. Suppose a master told his coachman not to drive when he was drunk, but he nevertheless did so, would not the master be responsible?" To which Mr. Mellish responded: "Here the defendants' driver *recklessly* and *purposely* obstructed the plaintiff's omnibus. That was not an act within the scope of his employment, and was contrary to the orders given to him by his master." CROMPTON, J., said: "Was not the driver carrying out his master's purposes in attempting to get before the other omnibus and pick up passengers?" WILLIAMS, J., said: "Suppose the driver of an omnibus saw a passenger waiting at a distance, and, in order to reach him before another omnibus, drove at full speed and thereby drove over a person, would not the master be liable?" It was held by the court (WIGHTMAN, J., dissenting) that the defendants were liable, and the doctrine of *Lyons* v. *Martin* (8 Ad. & El. 515), that, in order to render the master liable, the act done by the servant must be lawful, was directly impugned by CROMPTON, J., in the course of his opinion, and it may be regarded as settled, beyond question, that the question of the lawfulness or unlawfulness of the servant's act does not affect the question of the master's liability; but if the act was done in the course of his employment, and in furtherance of the master's business, and is within the authority of the servant, express or implied, the master is liable, even though the act is unlawful, willful, wanton or malicious.[1] On the trial of the action MARTIN, B., instructed the jury that, if the defendants' driver, being irritated, acted *carelessly*, *recklessly*, *wantonly*, *or improperly*, *but in the course of his employment*, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible, and that the instructions given by them to the driver not to obstruct other omnibuses, if he did not observe them, were immaterial as to the

[1] Howe *v.* Newmarch, 12 Allen (Mass.), 49; Ramsden *v.* Boston and Albany R. R. Co., *ante;* Holmes *v.* Wakefield, *ante;* Rounds *v.* Del. and Lackawanna R. R. Co., *ante;* Moore *v.* Fitchburg R. R. Co., 4 Gray (Mass.), 465; Hewett *v.* Swift, 3 Allen (Mass.), 420; Bryant *v.* Rich, 106 Mass. 180; 8 Am. Rep. 311; Sherley *v.* Billings, 8 Bush (Ky.), 147; 8 Am. Rep. 451; Goddard *v.* Grand Trunk R. R. Co., 57 Me. 202; 2 Am. Rep. 39; Jackson *v.* The Second Av. R. R. Co., 47 N. Y. 274; 7 Am. Rep. 448; Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23; 7 Am. Rep. 293; Duggins *v.* Watson, 15 Ark. 118.

question of the master's liability, but that if the true character of the driver's act was, that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible. Upon this direction being excepted to, the Exchequer Chamber held that it was correct. In the course of his judgment, WILLES, J., said: "It appears clearly to me that this was (and it was treated by my brother MARTIN as) a case of improper driving, and not a case in which the servant did any thing altogether inconsistent with the discharge of his duty to his master, and out of the course of his employment, a fact upon which it appears to me that the case turns. This omnibus of the defendants was driven in before the omnibus of the plaintiff. Now, of course, one may say that it is no part of the duty of a servant to obstruct another omnibus, and that in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say, in my opinion, those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servants, in the course of his employment, and the law is not so futile as to allow the master, by giving secret instructions to a servant, to set aside his liability. I hold it to be perfectly immaterial that the master directed the servant not to do the act which he did. As well might it be said that if a master, employing a servant, told him that he should never break the law, he might thus absolve himself from all liability for any act of the servant, though in the course of the employment." BYLES, J., puts the case very pertinently. He says: "I am also of opinion that my brother MARTIN's direction in this case was correct. He uses the words 'in the course of his employment,' which, as my brother WILLES has pointed out, are expressions directly justified by the decisions. His direction, as I understand it, amounts to this, that if a servant acts in the prosecution of his master's business, with the intention of benefiting his master, and not to benefit or gratify himself, then the master is responsible, although it were in one sense a willful act on the part of the servant. Now, it is said that this was contrary to the master's instructions. That might be said in ninety-nine cases out of a hundred, where actions are brought against the master to recover damages for the reckless driving of a servant. It is said that it

was an illegal act. So, in almost every case of an action against the master for the negligent driving of a servant, an illegal act is imputed to the servant."

SEC. 528. In *Rounds* v. *Delaware & Lackawanna Railroad Company*, a New York case, the question of the *implied* powers of a servant was ably discussed and considered, and what we conceive to be the true rule announced. In that case,[1] the plaintiff, a boy twelve years old, jumped on the baggage-car of the defendants' passenger train, to ride down to the round-house. A quantity of wood was pitched along the track. While the train was being backed down, and when it arrived at the wood-pile, the baggage-man in charge of the train discovered the boy on the car and ordered him off. The boy responded that he could not, because the wood was right there. The baggage-master, with an oath, kicked the plaintiff off the car, and, falling against the wood, one of his legs was thrown under the car and crushed. A notice, as follows, was posted in the baggage car: "No person will be allowed to ride in this baggage car except the regular train men employed thereon. Conductors and baggagemen must see this order strictly enforced." Still another notice was printed in the posted time cards, as follows: "Train baggagemen must not permit any person to ride in the baggage car except the conductor and news agent connected with the train. Conductors and baggagemen will be held alike accountable for a rigid enforcement of this rule." In an action to recover for the damages inflicted by the injury, the court held that the defendants were liable. COUNTRYMAN, J., in a very able and carefully-considered opinion, reviewed the cases bearing upon these questions, and, among other things, said: "The servant, in thus removing the plaintiff, was engaged in the line of his duty and obeying the instructions of the defendant, and to shield it from liability the instructions must have been reasonable and proper with reference to the rights of plaintiff, and must have been executed, under all the circumstances, in a reasonable and proper manner. Having made suitable regulations, the defendant was also bound

[1] Rounds *v.* Del. & Lackawanna R. R. Co., 5 T. & C. (N. Y.) 475, affirmed by court of appeals.

to see that they were properly executed. The principal must necessarily be answerable within reasonable limitations for the manner in which his instructions are carried into effect. * * * And the principal must necessarily be bound by any lack of judgment or discretion of the agent, whereby he acts improperly and inflicts unnecessary injury."[1]

SEC. 529. In *Lovett* v. *Salem, etc., Railroad Company*, it was held, that a driver of horse cars, whose duty it is to keep trespassers from riding on the platform, would naturally be expected to execute the order in a proper and lawful manner, but if he in fact executes it in an improper and unlawful manner, the master is liable therefor, because he takes the risk upon himself, by reposing any authority at all in the servant to do an act which, if improperly done, may result in injury to others. In a case of this character[2] the plaintiff, a boy of ten years of age, wrongfully got upon the defendants' street railway car while it was in motion, and was permitted to ride some distance, when, while the car was running at such a rate of speed as to make it unsafe for him to do so, he was ordered by the driver to jump off, which he did, and in doing so was thrown down, and his right arm being thrown under the car was run over and crushed, so that amputation was rendered necessary, and the court held that the defendant was responsible for the

[1] Lovett *v.* Salem, etc., R. R. Co., 9 Allen (Mass.), 557; Holmes *v.* Wakefield, *ante;* Kline *v.* Central Pacific R. R. Co., 37 Cal. 400; Sanford *v.* Eighth Ave. R. R. Co., 23 N. Y. 343.

A doctrine similar to this was held in Bayley *v.* The Manchester, etc., Railway Co., L. R., 7 C. P. 415. In that case the plaintiff was a passenger upon the defendants' train, and sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendants' by-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station master, etc., and do all in their power to promote the comfort of the passengers and the interests of the company. It was held by the court that the act of the porter, in pulling the passenger out of the carriage, was an act within the course of his employment as the defendants' servant for which they were responsible. In another case (Walker *v.* The South-Eastern Railway Co., 39 L. J. C. P. 346), the plaintiff, on arriving at the defendants' station, took part in a dispute going on between some other passengers and the defendants' servants relative to a railway ticket, whereupon the defendants' servants seized him, ran him down an incline, pushed him out of the station, and as he passed through the door, gave him a kick. In an action for the assault, the defendants were held liable.

[2] Lovett *v.* Salem, etc., R. R. Co., 9 Allen (Mass.), 557.

injury, the order of the driver to "jump off," considering the age of the plaintiff, being equivalent to a forcible ejection.[1]

SEC. 530. In *Garretzen* v. *Duenckel*, a Missouri case,[2] the application of this rule was well illustrated. In that case the defendant was the proprietor of a gun store, and his clerk upon one occasion, when showing a gun to a customer, at his request, and being informed by the purchaser that he would not purchase the gun unless it was loaded, loaded the gun, and, while being examined by the customer, it was accidentally discharged and injured the plaintiff, who was sitting at a window on the opposite side of the street, the master had expressly instructed the servant not to load any of the fire-arms, and it was urged in defense that the act of the servant being in conflict with and contrary to the master's orders, was not an act within the scope of the servant's authority, and the master could not be held liable therefor. But the court held that, notwithstanding the express order of the defendant, the act was one done in the prosecution of his business and in furtherance thereof, and was within the scope of the servant's employment.

SEC. 531. **Real test of liability.** — It is of no account that the master did not direct the doing of the act,[3] or even that it was done contrary to his instructions, or without his knowledge; the simple question is, whether it was done in the prosecution of his business and as an incident thereto.[4] It is of no importance whether the act is necessary to the prosecution of the master's business or not. Liability attaches if it was done in

[1] In Shea *v.* Sixth Av. R. R. Co., 62 N. Y. 180, one of the defendants' horse cars was standing at the corner of a street in New York, so as to prevent persons from passing across the street on the walk. The plaintiff, being desirous of passing, stepped upon the platform of the car for that purpose, when the driver pushed her off, and in falling she broke her arm. The court held that, inasmuch as it was the duty of the driver to keep trespassers off the platform, he was acting in the scope of his employment, and that the defendants were liable for the assault.

[2] Garretzen *v.* Duenckel, 50 Mo. 104; 11 Am. Rep. 405.

[3] Storey *v.* Ashton, L. R., 4 Q. B. 476; Barwick *v.* Joint-Stock Co., L. R., 2 Exch. 265; Seymour *v.* Greenwood, *ante;* Tuberville *v.* Stamp, Raym. 266; Filliter *v.* Phippard, 11 Ad. & El. 347.

[4] Hamilton *v.* Third Av. R. R. Co., 53 N. Y. 25; Barwick *v.* Joint-Stock Co., *ante;* Howe *v.* Newmarch, *ante;* Ramsden *v.* Bost. & Alb. R. R. Co., *ante;* Goff *v.* Gt. Northern R. R. Co. 3 El. & El. 672; Ewbank *v.* Nutting, 7 C. B. 797.

the prosecution of the work, and in furtherance thereof, even though the act was ill-advised and contrary to the master's orders. The test is, whether the act was done in the course of the master's business and in furtherance of it. If so, the master is responsible for the consequences, without any reference to the manner of the execution of the work.[1]

The fact that the order is proper and only contemplates a proper execution on the part of the servant does not change the rule of liability. Having clothed the servant with authority to do the act at all, the employer *is bound, at his peril, to see that it is properly executed*, and is liable alike for mistakes of judgment, or infirmity of temper on the part of his servant.[2]

The fact that he has expressly directed the servant *how to do the act, or not to do a particular thing*, is in no measure a defense. *If the act is within the scope of the servant's employment*, liability attaches for the consequences of a wrongful execution of the duty, without any reference to the degree of care exercised by the master to prevent it. It is not the instructions of the master that determine the extent and limit of the agent's authority, but the nature of the employment, the character of the service required, and the character of the act done, and the circumstances under, and the purpose for which it was done. GROVER, J., illustrated the matter thus:[3] "If," said he, "the owner of a building employs a servant to remove the roof from his house, and directs him to throw the materials upon his lot where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions, because done in the business of the master. But should the servant, for some purpose of his own, *intentionally* throw materials upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to serve some purpose of his own." In determining the question of authority, we must regard the object, purpose and end of the employment. When a person employs another to drive his carriage,

[1] Minter v. Pacific R. R. Co., 41 Mo. 503; Croft v. Alison, 4 B. & Ald. 590.

[2] Wood's Law of Master and Servant, 566.

[3] Cosgrove v. Ogden, 49 N. Y 255.

it is not to be presumed that he employs him to drive it purposely and intentionally against the carriage of another when such act is wholly unnecessary to carry out any purpose of his master; but, if the servant, in driving the carriage, finds himself involved in a position of danger, either to himself or the team, and in extricating himself purposely drives against the carriage of another and overturns it, this is most certainly within the line of his duty, and is within the scope of his authority, because he is presumed to be clothed with authority to do every thing essential to effectuate the purpose and ends of his employment.[1] BLACKBURN, J., in a recent case heard in the Queen's Bench,[2] very aptly illustrated the rule thus: "The question is," said he, "whether there is any evidence of an authority given by the defendants to the booking clerk to arrest the plaintiff, under the circumstances of this case. It is quite clear that there was no evidence of an express authority. Then can such authority be implied? The facts from which an authority can be implied are, that the person who arrested the plaintiff is a ticket distributor in the employ of the defendants; that he gives out tickets to persons intending to travel by the railway, and receives the money, and that the money received on behalf of the defendants is put into a till, of which he has the charge and custody. On these facts it may be fairly said that the booking clerk has an implied authority to do all acts which are necessary for the protection of the money intrusted to him. I am inclined to think that if a man in charge of a till should find a man attempting to rob it, and he could not prevent it otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen and he could not get it back except by taking the thief into custody, and he took him into custody with a view to a recovery of the money taken away, it might be that that also might be within the authority of a person in charge of the till. * * * There is an implied authority to do all those things that are necessary for the protection of property intrusted to a person, or for fulfilling a duty which the person has to per-

[1] Limpus v. General Omnibus Co., *ante;* Seymour v. Greenwood, 6 H. & N. 359.

[2] Allen v. London and South Western Railway Co., L. R., 6 Q. B. 68.

form. * * * For instance, where a company have, under a by-law, a power to arrest a man if he does not pay his fare, the primary object of the by-law is to enforce the payment of fares to the company and to protect their interest, and it has been rightly held that when a company leaves a servant in charge of a station he has an implied authority to decide that the by-law shall or shall not be enforced; but if the servant in charge of the station does an act in no way connected with the business of the company, there would be no implied authority for the act, and the company would not be liable."[1] In *Edwards* v. *The London & South Western Railway Co.*, *ante*, SMITH, J., enunciated the rule of liability from an implied authority, thus: "No doubt if, in furtherance of the particular business of the company, it is *necessary* to arrest a person, the servants of the company have an implied authority to do it. Thus, if there is a by-law of the company, and authority is given to arrest any person infringing it, it must be presumed that the company give authority to any one they put in charge of the station so to enforce it, since this can only be done by the company's servants on the spot." In *Seymour* v. *Greenwood*, 6 H. & N. 359, Baron POLLOCK said: "Suppose a servant, in driving along a road, in order to avoid danger, *intentionally* drove against the carriage of another, would not the master be liable?" Without stopping to give further illustrations from the modern cases, it may be said to be well settled that the master is not only responsible for the negligence or misfeasance or malfeasance of the servant in respect of the discharge of duties expressly imposed upon him, but also in all cases where the act of the servant is within the scope of his implied authority, and in determining this, the nature of the employment and the ends and purposes sought to be attained are material elements, and the real test of liability.[2] *Prima facie*, when the act is one which the master himself might have done, it will be presumed that it was an act within the scope of the servant's authority, and the burden of proving want of authority rests upon the defend-

[1] Poulton *v.* Railway Co., *ante;* Edwards *v.* Railway Co., L. R., 5 C. P. 445.

[2] Ramsden *v.* Boston & Albany R. Co., *ante;* Howe *v.* Newmarch, *ante;* Shea *v.* Railroad Co., *ante;* Goddard *v.* Grand Trunk R. Co., 57 Me. 202; Rounds *v.* Lackawanna, etc., R. Co., *ante;* Peck *v.* H. R. & N. Y. C. R. Co., *ante.*

ant.[1] In the first case cited in the last note the plaintiff brought an action for an assault committed upon him by the defendants' servant, a brakeman, in forcibly ejecting him from one of their passenger cars. It appeared that the defendants set apart a car for ladies and gentlemen accompanied with ladies. The servant was stationed at the entrance of the cars to direct passengers what cars to take. The plaintiff, not being accompanied by a lady, entered the car reserved for ladies, and the servant directed him to get into another car. This the plaintiff refused to do, and the assault complained of was committed in forcibly removing him. In defense it was urged that the servant exceeded his powers, and was not authorized to remove the plaintiff from the car, but only to direct him what car to take. Upon this question JAMES, J., said: "That a master is not liable for the wrongful acts of his servant, unless done in his service and within the scope of his employment, will not be disputed. If the employee who removed the plaintiff is to be regarded as a brakeman, unauthorized to perform any duties other than such as pertained to that office, and volunteered the act in question without other authority or direction, then the defendant was not liable in this case. But as brakeman he was an employee of the company, subject to its authority and the direction of its officers, and as such employee he was directed, by the person in charge, to see that gentlemen without ladies did not enter that car, and it was in the performance of that service he did the act complained of. It is true he was not ordered to remove persons from the car; his orders were to notify gentlemen not in charge of ladies that such car was reserved, and direct them to cars forward; so that in removing plaintiff he clearly exceeded the orders given him. But this fact the plaintiff could not know; as between him and the company it was enough that the act was done in the prosecution of his master's business, and if he deviated from or exceeded his instructions, that fact did not excuse the master from responsibility. The order to the brakeman, and his performance, warrants the conclusion, even as a matter of law, that he was acting within the scope of the employment he was then set to perform, if per-

[1] Peck v. H. R. R. Co., 6 T. & C. (N. Y.) 436; Jackson v. Second Av. R. Co., 47 N. Y. 274; Higgins v. Watervliet Turnpike Co., 46 id. 23; Cosgrove v. Ogden, 49 id. 225.

sons disregarded his directions and persisted in entering that car. The defendant had the right to set apart a car for lady passengers, and exclude other persons from it; if other persons, after notice, persisted in entering it, the defendant had the right to enforce their removal, using no more force than necessary for that purpose. The brakeman did no more than the master had the right to do under the circumstances, and the presumption is that in doing it he was acting within the scope of his then employment."[1]

SEC. 532. **Implied powers of agents.** — It is not necessary, in order to fix the liability of the corporation, that the agent should, at the time of the injury, have been acting under its orders or directions, or that the officers of the corporation should know that the servant was to do the particular act that produced the injury in question. *It is enough if the act was within the scope of his employment, and if so, it is liable, even though the agent acted willfully and in direct violation of his orders.*

This is upon the principle that a master cannot screen himself from liability for an injury committed by his servant within the line of his employment, by setting up private instructions or orders given by him, and their violation by the servant. "By putting the servant in his place," says Mr. Wood in his work upon The Law of Master and Servant, p. 585, "he becomes responsible for all his acts within the line of his employment, even though they are willful and directly antagonistical to his orders. The simple test is, whether they were acts *within the scope of his employment;* not whether they were done while prosecuting the master's business; *but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.*" By *authorized* is not meant authority *expressly* conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders. Thus, to illustrate: where a horse-car conductor who forcibly and violently pushes a passenger from a car which is being run by him, because the passenger refuses to leave the car until it comes to a full stop, it being no part of his duty to assist passengers in

[1] Isaacs v. Third Ave. R. Co., 47 N.Y. 122.

getting on and off the cars, the company is held not liable for the injuries resulting from the act, *because it is not within the scope of the conductor's duties or employment*, and is not such as can be said to have been within the contemplation of the employer, or as to have been authorized by him. But, if the assisting of passengers on or off of the cars had been a part of his duty, either by the express direction of the master, or by a well-established usage, the act, although willful and wanton, would have been within the scope of his employment, and the master would have been liable therefor. Thus, when a horse railroad company, among other things, requires its drivers to keep trespassers off from the platform, it is liable for the act of the driver in expelling a person therefrom, even though his act is *willful and wanton*, and although the person expelled by him is not a trespasser.[1]

The master can never escape liability for an *abuse* of authority by the servant;[2] therefore, the question always is, whether there was *any* authority, express or implied, on the part of the servant to do the act.[3] If so, the master is liable; if not, he is not liable, even though the act was done by the servant while performing his master's service.[4] In ascertaining this fact, the nature of the service, its character and incidents, as well as the orders of the master, if any, are all to be considered. To illustrate: a person employed as a conductor upon a railroad, whose duty it is to collect the fares of passengers, is, even though not specially directed so to do by his employment and the very nature of his duties, impliedly clothed with authority to eject a person from the cars,

[1] Shea *v.* Sixth Ave. R. Co., 62 N. Y. 180.

[2] Higgins *v.* Watervliet Turn. Co., 46 N. Y. 23; Shea *v.* Sixth Ave. R. Co., *ante;* Phila. & Read. R. Co. *v.* Derby, 14 How. (U. S.) 468; Phila., etc., R. Co., *v.* Steam Tow Boat Co. 23 id. 209.

[3] Shea *v.* Sixth Ave. R. Co., *ante;* Baldwin *v.* Casella, 21 W. R. 16.

[4] In Oliver *v.* Northern Transportation Co., 3 Oregon, 84, the defendants' servant injured the plaintiff by the careless discharge of a signal gun. The defendants claimed that they were not liable, because the servant disobeyed their instructions as to the firing of the gun. The court held that, inasmuch as the servant was authorized to discharge the gun by the defendants, they were liable for the *manner* in which he discharged it, whether in violation of their instructions or not. Enos *v.* Hamilton, 24 Wis. 658; Horner *v.* Lawrence, 37 N. J. L. 46; Case *v.* Mechanics' Bank, 4 N. Y. 166; Hynes *v.* Jungren, 8 Kan. 391; Cosgrove *v.* Ogden, 49 N. Y. 255; Tucker *v.* Woolsey, 64 Barb. (N. Y.) 142; Ryan *v.* H. R. R. Co., 33 N. Y. Sup. Ct. 137; North River Bank *v.* Aymar, 3 Hill (N. Y.), 262; McClanathan *v.* R. Co., 1 T. & C. (N. Y.) 501.

who shall neglect or refuse to pay his fare, and it is one of his duties, implied from the very nature of the employment and the character of the service; therefore, if in the performance of this duty, he uses more force than is necessary;[1] or if he assaults or insults a person who has in fact paid his fare, and is lawfully entitled to be upon the train;[2] or if he ejects a person from the train at a place where, by law, he has no right to eject him, the corporation is liable for his acts as much as though the act had been specially directed and authorized by it.

SEC. 533. **Matters to be considered in determining whether the act is within the scope of the agent's authority.** — In determining whether the act was one within the scope of the agent's authority, the character of the business and its probable consequences are to be looked to. Thus, if a canal company employs a person to attend a drawbridge,[3] it is liable for injuries inflicted by him in raising the draw. So, if a person is employed to blast in a quarry, the principal is liable for injuries resulting from the agent's failure to adopt proper precautions.[4] So, where a person is employed to drive an omnibus and pick up passengers, the employer is liable for injuries inflicted by him either upon individuals or the property of rival companies by improper driving.[5] So, where a railway company employs a conductor to run a train and collect fares, it is liable for an assault committed by the conductor upon a pssenger in a wrongful attempt to collect or secure the fare,[6] or where a brakeman is posted at the entrance to cars to direct passengers which car to take, for an assault committed by him upon a passenger in removing him from a car;[7] or where a station agent commits an assault upon a person in attempting to eject him from the station;[8] and so, generally, where the act is one done in doing that which the servant or agent was authorized to do, and is within the scope of his authority, the principal is answerable for the consequences.[9] In

[1] Jackson *v.* Second Ave. R. Co., 47 N. Y. 274; 7 Am. Rep. 448; Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23; 7 Am. Rep. 293.

[2] Goddard *v.* Grand Trunk R. Co., 57 Me. 202; 2 Am. Rep. 39.

[3] Hunter *v.* Glasgow, etc., Canal Co., 14 S. (Sc.) 717.

[4] Sword *v.* Cameron, 1 D. (Sc.) 439.

[5] Limpus *v.* General Omnibus Co., 1 H. & C. 526.

[6] Ramsden *v.* Boston & Albany R. Co., 104 Mass. 104.

[7] Peck *v.* R. Co., 6 T. & C. (N. Y.) 436.

[8] Hewett *v.* Swift, 3 Allen (Mass.), 423.

[9] Brown *v.* McGregor, 17 F. C. (Sc.) 232; Baird *v.* Graham, 1 Stuart (Sc.), 578; Green *v.* London, etc., Omnibus

order, however, to impute liability to the corporation, the relation of master and servant must have existed, that is, the servant or agent must either have been employed or controlled by the corporation, *or the right of control* must have existed in it, or it must have assented to the performance of the service by him, or have been notified of it after it was performed.[1]

SEC. 534. **Contractor's and contractee's liability.** — If the service was performed by an independent contractor, who performed it in his own way without being subject to the direction of the corporation, liability does not exist, unless the injury is a necessary result of doing the work at all.[2]

In a Connecticut case[3] a railroad company undertook to remove a cargo or coal from a vessel to its freight cars, and, having had some difficulty with the gang of shovelers who were on a strike, made an arrangement with its weigh-master to allow him a certain sum per ton for shoveling and dumping the coal, and that he should employ the shovelers, and if he could employ them for less than the sum allowed him, the difference should be his perquisite, independent of his regular wages as weigh-master. The weigh-master then hired a gang of shovelers, made his returns weekly to the company of the number of tons shoveled, received the amount allowed him and paid the shovelers. The regular pay-rolls of the employees of the company, including the weigh-master, did not embrace the shovelers. It was held that the shovelers were not the servants of the company.

So, where certain persons were authorized to construct a public sewer at their own expense, and they employed a person to do the work at an agreed price, it was held, in an action for injuries

Co., 7 C. B. (N. S.) 290; Garretzen *v.* Duenckel, 50 Mo. 104; Goff *v.* Gt. Western R. Co., 3 El. & El. 672; Moore *v.* Fitchburg R. Co., 4 Gray (Mass.), 465; Ramsden *v.* Boston & Albany R. Co., 104 Mass. 117; Adams *v.* Cole, 1 Daly (N. Y. C. P.), 147; Corrigan *v.* Union Sugar Refinery Co., 98 Mass. 577; Cosgrove *v.* Ogden; Hill *v.* Morey, 26 Vt. 178.

[1] McGuire *v.* Grant, 25 N. J. 356; Kimball *v.* Cushman, 103 Mass. 194; Whatman *v.* Pearson, L. R., 3 C. P. 423.

[2] Hunt *v.* R. Co., 51 Pa. St. 475; Hilliard *v.* Richardson, 3 Gray (Mass.). 349; Schular *v.* Hudson R. Co., 38 Barb. (N. Y.) 653; Potter *v.* Seymour, 4 Bosw. (N. Y.) 140; Painter *v.* Pittsburg, 46 Pa. St. 213; Brackett *v.* Lubke, 4 Allen (Mass.), 138.

[3] Burke *v.* Norwich, etc., R. Co., 34 Conn. 474; Murphy *v.* Caralli, 3 H. & C. 462; Murray *v.* Currie, L. R., 6 C. P. 24.

received by reason of the negligent manner in which the sewer was left at night, that the contractor could not be held responsible therefor.[1] The rule is that where an employee is exercising a distinct, an independent employment, and is not under the immediate control, direction or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee. Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver it at the store of the employer at so much per barrel, and while in the act of delivering the salt one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk, it was held that the employer was not liable for the injury.[2]

Where an employer made a bargain with his employee to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs until they reached the point of delivery, nor was he to render any assistance, pecuniary or otherwise, in the cutting or running of the logs,— it was held, that the relation of master and servant did not exist, and that the employee alone was liable for any injury occasioned to others by his conduct in performing his contract.[3] So, where the plaintiff was injured by being thrown from his wagon by collision with a car owned by the defendant, but drawn by horses owned by a contractor with whom they had contracted to draw their cars and furnish horses and drivers, the horses at the time of the injury being driven by a man employed by the latter, it was held, that the contractor alone was liable.[4] In a case where a railway company, by agreement under seal, engaged a contractor to build the railway, reserving power to the company to watch the progress of the work, and to dismiss any incompetent workmen employed by the contractor. In constructing a viaduct on parts of the railway over a public highway, a stone, through the negligence of the workmen, fell upon the plaintiff's husband, who was passing along the road underneath, and caused his death,—it was held, that the company was not

[1] Blake v. Ferris, 5 N. Y. 48.

[2] De Forrest v. Wright, 2 Mich. 368.

[3] Moore v. Sanborne, 2 Mich. 519.

[4] Weyant v. New York & Harlem Railroad, 3 Duer (N. Y.), 360.

liable for the damages,[1] and that a mere reservation of the right to discharge any of the workmen did not affect their liability, unless the defendant also reserved and exercised control over the work itself. And this is held to be the rule even as to municipal corporations, unless they have the exclusive control and care over the subject-matter of the contract. In a Pennsylvania case,[2] Judge STRONG, in commenting upon the policy of the rule, said: "It is difficult to discover any substantial reason or good policy for holding the present defendants responsible. The negligence complained of was not theirs. It does not appear that they knew of it. The verdict determines that the fault was on the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither were they his agents. They were in an independent employment, and sound policy requires that in such a case the contractor alone should be held liable. In making a sewer he has necessarily the temporary occupancy of the street in which the work was done, and it must be exclusive."

A railroad corporation is not liable for injuries to buildings in the vicinity of its road caused by blasting done by those who have contracted to grade the road or persons in their employ, although, under the contract, the corporation reserves the right to retain in its hands sums sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted.[3]

So, where A contracted with B and C to build her a house, to be finished complete, B and C employed D, a blacksmith, to make and place a grating in the area. The hole, over which the grating was to be placed, was left uncovered, and E fell into it and broke his leg. It was held that B and C, the first contractors, were liable to E.[4]

Where work was done for a railroad company under a contract, it was held that the company were not responsible for injury resulting to a third person from the negligent manner of doing the

[1] Reedie v. London & Northwestern R'way Co., 6 Railw. Cas. 184; 20 L. J. Exch. 65; 4 Exch. 244; Hobbitt v. Same, id. 244

[2] Painter v. Mayor of Pittsburg, 46 Pa. St. 213.

[3] Tibbets v. Knox & Lincoln R. R. Co., 62 Me. 437.

[4] McCleary v. Kent, 3 Duer (N. Y.), 27.

work, though they employed their own surveyor to superintend it, and to direct what should be done.[1]

Generally, a sub-contractor is not, in law, regarded as the servant of the person employing him. Thus, where the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings, he made a sub-contract with B, a gas-fitter, to execute this part of the work. In the course of doing it, through B's negligence, the gas exploded and injured the plaintiff. It was held that the defendant was not liable for the injury.[2] In a Scotch case,[3] it was held that the same rule applies as between a contractor and sub-contractor, as applies between the original contractee and contractor, the court remarking, that where a person contracts with one man to do a piece of work, and the latter subcontracts with another, the sub-contractor alone is liable for any damage committed in the course of the work by him.[4]

In a recent English case[5] an interesting question was raised as to the liability of a sub-contractor for the act of his servant, to a third person, between whom and the master there was no privity, when the liability in any measure depends upon a contract. In that case, by an agreement between the Smithfield Club and the defendants, who were proprietors of a building and premises at Islington, called the Agricultural Hall, the club were to have the exclusive use of the hall during the period of their annual show of stock, etc., the defendants providing and paying a sufficient staff (who were to be under the sole control of the secretary and stewards of the club), to receive, take care of, and redeliver the stock, etc., exhibited, and also paying the club £1,000, in consideration of which the defendants were to receive certain fees or admission money from the visitors. The stock and articles to be exhibited were received at the gate of the defendants' premises by one Sharman (upon orders signed by the secretary of the Smithfield Club), who contracted with the defendants for a lump sum, amongst other things, to receive them and to re-deliver them at

[1] Steel v. Southeastern R'way Co., 32 Eng. L. & Eq. 366.

[2] Rapson v. Cubitt, 9 M. & W. 710; 1 Car. & M. 64; 6 Jur. 606. But see McCleary v. Kent, 3 Duer (N. Y.), 27, contra.

[3] McLean v. Russell, 22 Jur. 394.

[4] Shield v. Edinburgh & Glasgow R. R. Co., 28 Jur. 539; Richmond v. Russell, 22 Sc. Jur. 394.

[5] Goslin v. Agricultural Hall Co., L. R., 1 C. P. D. (C. A.) 482.

the end of the show upon like orders, the defendants in no way interfering. One Stilgoe, who exhibited a pen of three sheep at the show in 1873, sold them to the plaintiff, and upon the plaintiff's drover producing an order for their removal signed by Stilgoe, Sharman, or one of his men, delivered him by mistake sheep from another pen. These the plaintiff rejected, and he brought an action against the defendants for converting his sheep, and it was held that the defendants were not responsible under the circumstances for the acts or defaults of Sharman or his men. And this decision was sustained on appeal, the court on appeal holding that, as between the plaintiff and the defendants, there was no privity of contract, and no duty on the part of the latter to re-deliver the stock, etc., at the close of the show.

SEC. 535. **Liability in case of a nuisance attaches only when a nuisance necessarily results.**— Where a person lets work to be done by another, by contract or job, which is innocent and lawful in itself, but which *may*, if carelessly or negligently done, result in injury to another, he is not charged with liability if such work is in fact carelessly and negligently performed. He is only liable in such cases when the work to be done *necessarily* creates a nuisance. When it is lawful in and of itself in all its details he is not liable for the acts of the contractor or his servants unless he retains control over the work *and* the instruments of its performance. He may personally, or by an agent, superintend the work, or direct as to *what* shall be done, provided he does not retain control over the *method* and *means* of its accomplishment. Thus, where a person, in erecting a building upon a public street, lets out the stone work to be done by a contractor, *under the direction and to the satisfaction of a superintendent employed by him*, this reservation is not such a reservation of control over the *method* and *instruments* of accomplishing the work, as renders him liable for an injury resulting from the negligent execution of the work by the contractor.[1]

But when the work is, of itself, in any of its details, unlawful, or necessarily results in the creation of a nuisance, the employer

[1] Chambers *v.* Ohio Life Ins. and Trust Co., 1 Dis. (Ohio) 327; Forsyth *v.* Hooper, 11 Allen (Mass.), 419; Hunt *v.* Penn. R. Co., 51 Pa. St. 475.

having the power to abate it, and it being his duty to do so, he is liable if an injury results from a nuisance created by the contractor with the assent of the employer, express or implied.[1] So, too, he is liable if he retains control over the method and means of doing the work. Thus, where the defendant let a contract for re-paving the streets of a city, but reserved entire control over the *manner* of doing the work, it was held that the relation of master and servant existed, and that the defendant was liable for injuries resulting from the negligent or improper execution of the work,[2] or if he interferes and directs *how* the work shall be done, and injury results to others while his orders are being executed.[3] "When," says APPLETON, J.,[4] "the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside of the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible."

"The authority is implied from the employment, and is a natural and legitimate incident of the service. Thus, where a brakeman was stationed at the entrance of railway cars at a depot, to direct passengers which car to take, and one car was set apart for ladies, or gentlemen accompanied with ladies, and a gentleman without a lady entered the ladies' car, and the brakeman forcibly and violently ejected him from the car, it was held that the company was liable for the injury so inflicted, because, having placed the brakeman in that position to see that the rules of the company were observed, he must be regarded as being impliedly clothed with authority to enforce obedience thereto by force."[5]

[1] Clark *v.* Fry, 8 Ohio St. 358; Carman *v.* Steubenville, etc., R. Co., 4 id. 399; Dygert *v.* Schenck, 23 Wend. (N. Y.) 446; Vanderpool *v.* Husson, 28 Barb. (N. Y.) 196; Matheny *v.* Wolffs, 2 Duv. (Ky.) 137.

[2] Cincinnati *v.* Stone, *ante*.

[3] Heffernan *v.* Benkard, 1 Robt. (N. Y.) 432.

[4] Eaton *v.* European & Northern R. Co., 59 Me. 520; 8 Am. Rep. 430.

[5] Peck *v.* N. Y. C. R. Co., 6 T. & C. (N. Y.) 436. JAMES, J., in delivering the opinion of the court, very aptly expressed the rule thus: "If the employee, who removed the plaintiff, is to be regarded as a brakeman, unauthorized to perform any duties other than such as pertained to that office, and *volunteered* the act in question without other authority or direction, then the defendant was not liable.

SEC. 536. **Corporations bound to the same degree of care as natural persons — degree of care.**—From what has been said it will be seen that corporations are bound to the same degree of care in the conduct of their business, and are subject to the same rules of liability for wrongful acts committed by them in the line of their duty, as individuals are, and, being liable for the tortious or wrongful acts of their servants or agents, it follows as a natural and legitimate result that they are liable for the *manner* in which their duties are discharged, or, in other words, *for the negligence of their officers, agents or servants in the discharge of their duties, in whatever department they are employed.* The question of liability for acts claimed to be negligent must depend largely upon the powers and purposes of the corporation and the agencies employed in the conduct of its business.[1] The rule is that a degree of care must be observed *commensurate with the character of the agencies employed, and the risk to others from their improper or negligent employment.*[2]

Thus, while a railroad company is bound to exercise the highest degree of care in the selection of its machinery, cars, servants and other appliances, and in the construction of its road-bed, and in keeping the same in repair, yet it is not liable for the result of an *accident* which could not have been prevented by the exercise of such care. In other words, *when an injury results from causes that the exercise of the highest degree of care could not*

But, as brakeman, he was an employee of the company, subject to its authority and the control of its officers, and, as such employee, he was directed by the person in charge to see that gentlemen without ladies did not enter that car, and it was in the performance of that service he did the act complained of. It is true he was not ordered to remove persons from the car; his orders were to notify gentlemen not in charge of ladies that such car was reserved, and direct them to cars forward; so that in removing the plaintiff he clearly exceeded the orders given him. But this fact the plaintiff could not know, as between him and the company it was enough that the act was done in the prosecution of the master's business; *and if he deviated from or exceeded his instructions, that fact did not excuse the master from liability.* The order to the brakeman and his performance warrants the conclusion, even as a matter of law, that he was acting within the scope of the employment he was set to perform." Limpus *v.* Genl. Omnibus Co., *ante;* Seymour *v.* Greenwood, *ante;* Moore *v.* Railway Co., 21 W. R. 145: Bayley *v.* Railway Co., L. R., 7 C. P. 415.

[1] Philadelphia, etc., R. Co. *v.* Derbey, 14 How. (U. S.) 468.

[2] Wood's Law of Master and Servant, 688, 788.

have prevented, it is not liable, as such injuries are the result of inevitable accident.[1]

SEC. 537. **Not insurers against all casualties.**— A railroad corporation is not an insurer against every possible casualty, but only for such as result in spite of the highest degree of vigilance.[2] While it is bound to construct its road-bed and maintain it and its bridges in a safe condition for the use of its passengers,[3] yet, it is not liable for injuries resulting from defects therein that no degree of care or vigilance could have detected. Thus, while it is undoubtedly bound to construct them in such a manner as to withstand the effects of ordinary freshets, or, possibly, *extraordinary* freshets, yet it is not responsible for not securing them against *unprecedented* freshets, such as could not have been reasonably foreseen or guarded against.[4] In the case last cited, an action was brought for an injury received by the plaintiff while riding over the defendants' road. The case disclosed that the road-bed was constructed some five years prior to the accident, and ran through a marshy country *subject to floods;* that it was constructed on a low embankment composed of a sandy sort of soil likely to be washed away by water, *and that the culverts were insufficient to carry off the water. It was not shown, however, that the soil of the line had been washed away before, or that the water had ever come up to the embankment.* It also appeared that, on the day upon which the accident occurred, an *extraordinary storm*, attended with very violent rain, had been raging for over sixteen hours, and that in consequence of this a stream near to the spot at which the accident occurred had swollen to a torrent and washed away a bridge, and passed down with great force upon the line. By midnight the water had worn away the earth under the sleepers, in some places leaving the rails unsupported and exposed, but it did not appear that the water had at any part of the line caused the evil, *or that the condition of the line could be perceived.* The train upon which the plaintiff was injured was the express, and upon the whole went at the ordinary rate of an express train,

[1] Kansas Pacific R. Co. *v.* Miller, 2 Col. 442.

[2] Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409.

[3] Pittsburg & Fort Wayne R. Co. *v.* Gilleland, 56 Pa. St. 445.

[4] Withers *v.* No. Kent. R. Co., 27 L. J. Ex. 417.

although there was some evidence that it was being driven at a faster rate at the time when the accident occurred, to make up for lost time. The train had passed over the line safely until the accident occurred, by reason of the undermining of the sleepers and the consequent giving away or settling of the rails, which threw the train down an embankment and seriously injured the plaintiff. The jury returned a verdict for the plaintiff for £1,500 damages, which, upon hearing in Exchequer, was set aside upon the ground that there was no sufficient evidence of negligence on the part of the defendants to sustain it. BRAMWELL, B., said: "It is said that the construction of the line was such as to make it dangerous in a flood, and that, therefore, the defendants' servants must have known that it was dangerous to drive at an express rate of speed. *But negligence must be shown by the plaintiff. It is not enough to show that an accident arose from certain extrinsic or external causes.* Where is the evidence of negligence? *It is contended on the part of the plaintiff that the company's servants were bound to know the consequences which were likely to follow from the flood.* That is not so. *They were bound only to know that which could be known by the exercise of ordinary skill and prudence,* otherwise they would be made insurers of the safety of the passengers. There was no engineering or other skilled evidence to show that water would wash away the soil of which the embankment was made. So far from there being any evidence to show that there was negligence, there was evidence to negative the negligence imputed. The very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence that was set up. There was nothing to show that, until the accident occurred, there had been any thing to indicate danger, or to warn the company's servants to cease running the trains. *The verdict was wholly unwarranted.*" [1] The track must be in a safe condition so far as human foresight can accomplish that result, but unless *negligence* in some respect contributing to an injury resulting from defects therein can be

[1] In Pittsburg, Fort Wayne, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445, a similar doctrine was held. See, also, similar in principle, Blyth *v.* Birmingham Water Works Co., 11 Exch. 781; Fast *v.* Third Av. R. Co., 1 Daly (N. Y. C. P), 148.

attributed to the company it is not liable.[1] No precise rule of diligence can be stated, but the company is bound to construct its roadway in such a manner as to be able to resist all such action of the weather, from floods or whatever cause arising, that may be expected to occur, although only at long intervals, and as a necessary sequence, if *extraordinary* or unprecedented floods have once occurred, it must redouble its vigilance, and place its embankments in such a condition as to resist another of similar severity or intensity.[2]

SEC. 538. **Care required of railroad corporations in relation to engines, cars, track, etc.** — The same degree of care is required in the selection of engines and cars, and other appliances for the prosecution of the business.[3] The company is not exonerated from liability for injuries resulting from defects in its vehicles, because it purchased them from competent manufacturers, but is responsible for defects therein resulting from the negligence of the manufacturers, precisely the same as it would be if it manufactured them itself.[4] It is not responsible for *all* defects therein, but only for such as could have been ascertained by the exercise of the highest degree of vigilance,[5] or, in other words, for defects which could not have been detected by any degree of care or skill, either in the course of manufacture or afterward.[6] In New York a different rule of liability has been held, and the company is held to be bound at its peril to provide safe cars, and is responsible for injuries resulting from defects therein, irrespective of the question of negligence.[7]

The rule in reference to the degree of vigilance to be observed was well expressed in an English case, previously cited.[8] In that

[1] Toledo, etc., R. Co. *v.* Apperson, 49 Ill. 480; Reed *v.* N. Y. Cent. R. Co., 56 Barb. (N. Y.) 493; Gonzales *v.* N. Y. Cent. R. Co., 39 How. Pr. (N. Y.) 407.

[2] Great Western R. Co. of Canada *v.* Fawcett, 1 Moore's P. C. C (N. S.) 101.

[3] Readhead *v.* Midland R Co., L. R. 2 Q. B. 412; Burns *v.* Cork, etc., R. Co., 13 I. R. C. L. 543; Grote *v.* Chester, etc., R. Co., 2 Exch. 251.

[4] Burns *v.* Cork, etc., R. Co., *ante.*

[5] Stokes *v.* Eastern Counties R. Co., 2 F. & F. 691; Manser *v.* Eastern Counties R. Co., 31 L. T. (N. S.) 585.

[6] Readhead *v.* Midland R. Co., L. R., 4 Q. B. 379.

[7] Alden *v.* N. Y. Cent. R. Co., 26 N. Y. 102.

In Hegeman *v.* Western R. R. Co., 13 N. Y. 9, the plaintiff was injured by the breaking of an axle, from a latent defect *which could not have been discovered by the most vigilant examination*, and the company was held chargeable.

[8] Manser *v.* Eastern Counties R. Co., 31 L. T. (N. S.) 585.

case, an action was brought by the plaintiff to recover damages for injuries sustained by him whilst traveling on the defendants' railway, as he alleged, from the negligence of the company. It arose from an imperfect weld in the formation of a wheel — in this case the driving-wheel. It appears in this case, that driving wheels are usually formed in the first instance with a thickness of about 2¼ inches. They are allowed to run some time, and then ground down or re-turned for the purpose of making them again smooth; and this operation is performed about three times. Ultimately the thickness of the wheel is reduced from about 2½ or 2¼ inches to about 1¼. If it happens to be below 1¼ it is considered worn out, and should not be continued in the use. About three times a wheel may be re-turned; or it may be re-turned only twice, but with three different thicknesses. Before it is used the first time it should be hammered all round and all over to test its soundness, and to ascertain, as far as it is possible to ascertain, if it be perfect, whether it will ring, and is sound in every part. This wheel had been so tried before it was used. It had run many thousands of miles, and had been reduced ¼ or ½ an inch of its thickness. But although the wheel had been tested by the universal hammering in the first instance, it had not been subjected to that test after it had been reduced in thickness by wear. The wheel was defective, it gave way, and hence the accident.

The cause was tried in London before the Lord Chief Bnron, when the jury returned a verdict for the plaintiff, for £2,000, damages.

CHANNELL, B., said: "This was an action brought to recover compensation in damages for injuries sustained by the plaintiff, owing to the alleged negligence of the defendants. * * *

"The Lord Chief Baron, in summing up, appears to me (if I may take the liberty of saying so) to have left the case at the trial to the jury very fairly toward the company. There were certain passages selected by Mr. Bovill, and strongly commented on, but there were other passages in the summing up to which the attention of the court was called, and to which it will be necessary, I think, we should advert. His Lordship, after stating the nature of the action, said: 'With respect to the law there

is really no doubt whatever. If every part of the case was as clear and undoubted as the legal questions that arise, there would be very little difficulty indeed in disposing of the case, without any trouble whatever. There can be no doubt that in point of law the defendants are bound to provide carriages and other appliances which shall present every reasonable prospect of safety. They are bound to guard against every source of danger that they can foresee. But if the case stated by Mr. Bovill for the defendants be made out in point of fact, as to which there is contradictory testimony, which it is for you to decide — if that case be made out in fact, then undoubtedly the defendants would be entitled to your verdict. The defendants are not liable for any cause of danger that cannot be foreseen by the exercise of reasonable care and caution in preparing for the journey; and if, therefore, the entire cause of accident was this defective weld, which was not known, and could not, by any reasonable skill, care or prudence, be discovered, then the defendants are entitled to your verdict.' The law in that respect was laid down as favorably to the company as the company had a right to expect. That was his Lordship's observation at the commencement of the summing up; at the end of the summing up, in substance, that direction is repeated, his Lordship saying, it is important that every attention should be paid to the machinery, 'in order that the lives of the passengers may be placed in as much safety as possible.' He goes on to say: 'The company, however, are not bound to do that which is impossible; they are not bound to see that which is invisible, but they are bound to take every precaution. It is entirely, gentlemen, for you to decide whether in your judgment they have done every thing which their situation in providing conveniences for passengers required of them, and whether there was any deficiency, or whether they entirely and perfectly discharged that duty. If they entirely performed it, I think they are entitled to your verdict. If they did not, if there was any thing that might reasonably be required of them under the circumstances which in your judgment they did not perform, I think they would be liable, and it would be entirely for you to say what damages the plaintiff would be entitled to in the event of your thinking him entitled to your verdict.' Now, it is impossible, I think, that the

rule could be laid down more correctly than it was, both at the commencement and the conclusion of his Lordship's summing-up. But there were particular passages in the course of the summing-up, which were excepted to. This passage was excepted to. Mr. Bramwell,' an engineer, had been called on the part of the plaintiff, and in the course of his cross-examination he said: 'I know of no mode of discovering the defect; if the tire be struck that may or may not detect it.' Now, it is quite clear, looking at the cross-examination of Mr Bramwell, and of all the other witnesses, what was meant to be stated was this: there was no test that was absolutely fixed — no test that, in every instance, would turn out to be sure and successful; but it cannot be contended a test ought not to be adopted, if it is a useful one, and may reasonably be expected to bring about the result, because it is not absolutely fixed. Now, the particular remark that was objected to was this: 'In all probability, if this tire had undergone the process not merely of ringing it with a hammer to see whether it was sound, but of hammering it all round and all over, the defect would have been discovered, because there can be no doubt, in regard to a bell which is now silent (but which we heard for some time as if the whole material of the clock at Westminster were perfect), it was cracked, but continued to strike; and nobody was aware of it. Somebody observed on a rainy day, when the bell was struck and the water trickled down, it had a tremulous motion on each side, and the vibrations were not perfectly equal. The man called somebody to watch it, and then they discovered that the bell was cracked. So that there can be no doubt that merely going to a tire and striking it with a hammer will not tell you.' That is the substance of my Lord's observation. It was an observation founded on experience — that the test of the hammer upon the tire would enable you to see whether the tire would ring where it was cracked in one part. But what was contended for on the part of the plaintiff was, the tire should have been hammered all over; and there was a body of evidence and an important witness to that point. There was abundant evidence to show, when the tire had been re-turned, as it is called, if it had been hammered all over, in all probability this defect would have been discovered.

It appears that there is nothing in my Lord's observations that can warrant any objection on the score of misdirection. * * * A witness had said: 'It should have been hammered all round.' My Lord goes on to explain what is meant by that: — 'What he means by that, I suppose is, that they should not merely strike it with a hammer to see whether it would ring, which, no doubt, a cracked piece of metal would, but they should have hammered it all round to ascertain; and certainly, as the iron becomes less and less, no doubt that is a sort of care which should be taken, because by the hammering you may stumble upon some particular spot that is defective. One of the witnesses for the defendants told us to-day, that there was a thickness as of a piece of paper — a thickness over the imperfection in the weld, and if you came to hammer there, there is no doubt, I think, that you would discover that.' Now, my Lord certainly expresses his own opinion; if the weld had been reduced to this thinness, as appeared from one of the defendants' witnesses, in his judgment, if it had been hammered all over, the defect would have been discovered. Though my Lord expresses that opinion, he does not withdraw it from the consideration of the jury, but he goes on to say: 'You must judge for yourselves. I have no doubt, gentlemen, that if not all of you, a great many of you, must have the means of judging upon that subject quite as well as any of the witnesses, and probably much more than myself.' That was an opinion certainly given by my Lord as to a point that arose in the course of the evidence — an opinion in which few would disagree; but whether it be right or wrong is not the question we have to determine. The matter was not submitted to the jury as a matter of law — it was not decisive of the evidence; but the question was left to the jury that they might exercise fully and freely their judgment upon the subject. Now, the only other passage that was objected to was a passage to this effect: — 'I cannot help saying, in passing, that it appears to me, before an old tire is ever sent to be re-turned, and put in use for the purposes of a leading wheel, it ought really to be hammered all over; because there may be (and this is an illustration of it) a wheel that has performed thousands of miles with perfect safety, which has apparently got the best character that a wheel can have, but it turns

out to have been ground down until you came to within, according to the case of the defendants, a surface not thicker than paper, that separated you from an imperfect weld. You are quite as well able to judge as I am. If that were accurately tested by hammering over every part of it, you would say whether that would not certainly be discovered. If there was nothing but the thickness of a piece of paper to separate you it might not be visible to the eye, but it must be ascertainable by a hammer, which would certainly give a different sound when you came to that spot.' Again: my Lord expresses an opinion in which I entirely concur, and it appears to me to have been correct upon the evidence. But my Lord did not express his opinion at all to the contrary, or fetter the jury; the question was left fully and freely to them to exercise their own judgment upon. It appears to me there is no ground whatever for saying there was any misdirection of which the defendants have a right to complain, and it really was hardly insisted on that there was no evidence to go to the jury; it is enough to say, the evidence of Mr. Bramwell, the evidence of Sir C. Fox, the evidence of Mr. Braithwaite, and the evidence of Mr. May, formed a strong case on the part of the plaintiff to go to the jury, which my Lord could not have refused to leave to them. I am clearly of opinion that, had he done so, the plaintiff would have had good ground for excepting that the evidence had not been submitted to the jury as it ought to have been. Then, as to the case of the verdict being against the weight of evidence, no doubt there was a strong body of evidence on the part of the defendants. No doubt many witnesses were called, witnesses of experience and respectability, and one would not necessarily be dissatisfied if the jury had found upon the evidence a verdict for the defendants. On the other hand, there was strong and positive evidence on the part of the plaintiff. I cannot say the jury have come to a wrong conclusion. I am not called on to say I should have found the same verdict myself. I can see no ground for expressing any judicial dissatisfaction with the verdict of the jury. I would refer to one witness as a witness of very considerable importance — Sir Charles Fox — who gave evidence having a most material bearing upon the case. He was engaged largely in the manufacture of wheels of all descrip

tions, and he was asked whether he adopted any process to test the tire. He was asked, 'Do you hammer it?' and he says: 'The process upon which I have manufactured all my wheels has been this, to let all the different parts of the work be done by piecework, so that if a man found a defective bar he did not get paid for bending. If a man had to bend a defective bar, or bend a good bar, and bent it improperly, we did not pay for them, so that every man was looking back through the whole process of the manufacture up to the last; and then we have a gentleman to whom we pay 300*l*. a year to examine every wheel.' So that this gentleman kept a person in his employ at a considerable salary for no other purpose than to test wheels when they were made. He says they are tapped with a hammer, and when he is asked how tires are tested, he says no defect would be passed over with the hammer. No witness pretended to say it was an absolute and positive test, but there is no excuse for not adopting it, if it can be reasonably expected to produce a satisfactory result. This was the universal process adopted by this gentleman at a considerable cost and expense. He is asked this question: 'Have you found any returned to you after being passed by you as complete?' 'We guaranteed all the wheels we made for twelve months, and having turned out 20,000 wheels for several years, I think the whole amount of our guarantee has been twenty-four.' Now, the wheel in question had been reduced a considerable size; it was reduced to a small thinness; it was blocked and re-turned, and if this process had been adopted, not to hammer any one part to see whether it would ring, but to hammer it all over, as was the universal practice on the part of Sir Charles Fox, a practice carried out at a considerable expense, it was for the jury to say whether the defect might not have been discovered. I repudiate the notion altogether that a process ought not to be adopted, because of necessity you would not arrive at a positive test. It seems to me there is no ground for saying the verdict is against the weight of evidence, and that a new trial should be granted. Therefore, having at my Lord's request gone carefully through the evidence, I repeat the opinion I was prepared to give when the rule was moved, that the verdict ought to stand."

POLLOCK, C. B., said: "I entirely agree with the rest of the

court on the subject of refusing the rule why there should not be a new trial. When Mr. Bovill moved this rule, he certainly took a very strong view of the case on the part of the defendants, it appeared to me it was desirable that the matter should be looked into with very great care, in order that no mistake might be made. I am very much obliged to my learned brothers who have taken the trouble of going through the short-hand writer's notes which Mr. Bovill furnished us with. A very strong statement made by Mr. Bovill I own rather startled me. I certainly did not recognize, in his statement of the matter, any thing like what I remember to have been said in the course of the trial. According to his statement, certainly, at one time, there was no evidence whatever to support the view that had been presented to the jury, as he said, under the authority of the Bench. On turning to the evidence, certainly it appeared there was abundant material for the remark that was presented to the jury by me, but which was left entirely to them, not at all pressing my opinion upon them, but stating, it appeared to me, that any person conversant with machinery, and the ordinary business connected with such matters, would probably be far better able to judge than I was of the point. There was much other important matter upon which the jury might have decided, and very likely did decide, the case; but as far as this point was concerned the question was this — about the nature of the accident there was no doubt whatever, it arose from an imperfect weld in the formation of a wheel — that was the driving-wheel. A driving-wheel is formed in the first instance with a thickness of $2\frac{1}{2}$ inches; it is allowed to run some time, and is then ground down, or re-turned, for the purpose of making it again smooth, and this operation is performed about three times; ultimately the thickness of the wheel is reduced from $2\frac{1}{2}$ or $2\frac{1}{4}$ to $1\frac{1}{4}$; if it happens to be below $1\frac{1}{4}$ they consider it is worn out, and do not continue it in the service. About three times is the number of times that a wheel may be re-turned, or twice it may be re-turned, so that it is put into use with three different thicknesses. Now, the first time, before it is used at all, it is hammered all over. I cannot understand the expression, but the expression in the evidence was, 'hammered all round;' which I apprehend to be testing with the hammer not

merely whether it will ring, but whether it is sound in every part. Now, if it be worth while to do that when the wheel is first in its state of newness, in order to test it by applying the hammer to every part of it, to see whether it be sound or not, it surely must be worth while, every time you take away from it a quarter or half an inch of its thickness, in order to prepare it for a fresh journey. That was the question the jury had to decide; and I agree with my learned brothers that the law was laid down correctly, and as favorably for the defendants as it could be. The question then would be — *Did they use any reasonable precaution in order to discover whether the wheel in its last condition was fit for service?* Why it appeared to be perfectly clear upon the evidence that, though they had tested the wheel by the universal hammering in the first instance of applying it to the purposes of a locomotive, it had never been subjected to it since, and an imperfect weld, which may be imperceptible to the hammer when the wheel is 2½ inches thick, may be quite perceptible when the wheel is reduced to 1½. Therefore it was a question for the jury. There was evidence that they actually applied the test when the wheel was new; there was evidence that they had not applied it when the wheel was turned the first time, and when it was turned the second time; and I think it is no answer in fact or law to say that the test is not decisive. It might have escaped the discovery, notwithstanding the test had been applied, because at the time of the accident all parties were perfectly agreed that it was an imperfect weld, which gradually came to the surface at the time of the accident. The witnesses for the plaintiff said in their judgment it was apparent that the thinness of paper had been worn through. By the evidence of the witnesses for the defendants, the thickness was no more than the thickness of a bit of paper, and the question is whether, if it had been hammered, it would not have disclosed by the sound, immediately, that there was some imperfection below, and that it was not sound. Under these circumstances I perfectly concur in the opinion expressed by my learned brothers, that there should be no rule in this case."

This rule seems to be more consistent with principle, and better calculated to subserve public interests than that adopted in

New York;[1] particularly when coupled with another rule, that the mere fact that the vehicle was defective, *prima facie*, raises a presumption of negligence.[2]

But this rule seems to have been essentially modified by later decisions in that state, and there would seem to be no question that some negligence is now required to be shown in order to uphold a recovery.[3]

There seems to be an inconsistency in holding the company up to such a rigorous rule of liability as to cars, when no such rule prevails *as to the track* over which the cars are propelled. If it be said that the reason results from the fact that the cars are *manufactured*, and therefore the company is bound, at its peril, to know of the existence of latent defects, it may be answered that the same is true of the track. It is manufactured so to speak, and the same rule should apply to that, as applies to the cars. Yet, the courts of New York hold that as to the track and its management, the company is exonerated from liability, if it has exercised the highest degree of care in respect to it.[4]

So, it has been held that an accident resulting from the misplacement of a switch, by "some evil-disposed person," not connected with the company, the company being chargeable with no fault, is an *inevitable accident* for which the company is not responsible.[5]

In the selection of rails, and other materials of which its track is composed, as well as in the construction of its roadway and bridges, it is bound to exercise the highest degree of care, and apply all those tests usually applied for ascertaining their suitableness, and, having done that, and keeping up the same degree of vigilance in ascertaining whether it subsequently becomes defective, it is not responsible for injuries resulting from defects, *in spite of such vigilance.*[6] It is difficult to conceive how a person or corporation can be held chargeable with negligence, when he has exercised the highest degree of care to prevent the injury.[7]

[1] Frink *v.* Potter, 17 Ill. 406; Ingalls *v.* Bills, 9 Metc. (Mass.) 1.

[2] Dawson *v.* Manchester, etc., R. Co., 5 L. T. (N. S.) 682; Brignoli *v.* Chicago, etc., R. Co., 4 Daly (N. Y. C. P.), 182.

[3] Deyo *v.* N. Y. C. R. Co., *ante.*

[4] Keeley *v.* Erie, etc., R. Co., 47 How. Pr. (N. Y.) 256.

[5] Frink *v.* Potter, 17 Ill. 406; Deyo *v.* N. Y. C. R. Co., 34 N. Y. 9.

[6] Nashville, etc., R. Co. *v.* Messino, 1 Sneed (Tenn.), 220; Deyo *v.* N. Y. C. R. Co., *ante.*

[7] In Frink *v.* Potter, *ante*, where a passenger was injured by the breaking of an axle from the effect of frost,

It must exercise the highest degree of care in all respects involving the safety of passengers, and if guilty of *any, even the slightest negligence*, it is responsible for all injurious consequences.[1]

SEC. 539. It is bound to keep its stations and premises in proper repair, so as to prevent injuries to passengers going to them to take, or arriving there *upon*, their trains,[2] and a passenger arriving at the station, continues to be a passenger until he has left their premises. So, to a person *bona fide* at the station for the purpose of taking passage upon a train, is a passenger, although he has not in fact purchased his ticket.[3]

SEC. 540. **Instances of negligence, where the corporation was held liable.**—Actions have been upheld for injuries sustained from defective platforms;[4] from a failure to provide suitable lights to enable pas-

the court held that, if the defendant was guilty of *any*, even the slightest negligence in not providing against such a result, it was liable. This is equivalent to holding that, if by the exercise of any reasonable precaution the result could have been averted, the defendant was bound to exercise such precaution, and failing to do so, was liable for negligence. See, also, Dawson *v.* Manchester, etc., R. Co., *ante;* Toledo, etc., R. Co. *v.* Apperson, 49 Ill. 480; Reed *v.* N. Y. C. R. Co., 56 Barb. (N. Y.) 493; Gonzales *v.* N. Y. C. R. Co., 39 How. Pr. (N. Y.) 407.

[1] Gaynor *v.* Old Colony R. Co., 100 Mass. 208.

[2] McPadden *v.* N. Y. C. R. Co., 44 N. Y. 478.

The fact that the vehicle or track is defective and an injury results, is *prima facie* evidence of negligence Brignoli *v.* Chicago, etc., R. Co., 4 Daly (N. Y. C. P.), 182.

[3] Buffett *v.* Troy and Boston R. Co., 40 N. Y. 168.

[4] As where the flaps were improperly turned back. BRAMWELL, B., in Cornman *v.* Eastern Counties R. Co., 4 H. & N. 784.

In McDonald *v.* Chicago, etc., R. Co., 26 Iowa, 124, the plaintiff, in company with her husband, purchased a ticket at Cedar Rapids upon the defendants' line of railway to Fulton, Ill. In attempting to get aboard the train some twenty minutes before it was time for it to leave, and at a point some distance from the usual place, she stepped upon the end of a plank in the platform which, being loose and out of place at one end, gave way, and let her down upon the track headforemost under the train, breaking her leg and otherwise injuring her. It was so dark that the plaintiff could not see the condition of the plank. The defendants showed that the point at which the injury happened was some 300 feet from the station, and that the usual place for passengers to get on or off the train was at a point immediately in front of the station.

It was also shown by the defendant, that it was customary when the train arrived, as in this instance, from the west, to run back so as to bring the baggage and express cars to a point opposite the freight depot for the purpose of discharging and receiving baggage and express matter. This movement, on the evening on which the accident in question happened, placed the passenger coaches west of the west end of the platform, so that the nearest passenger car was about one car-length beyond the steps at the west end of the platform. It was while the cars were thus standing that the plaintiff, without waiting for them to be drawn up to the platform in front of the passenger depot, started for them, walking the whole length of the platform, and in descending the

sengers safely to leave the premises;[1] from defective steps to platform;[2] from pits or unfenced holes in the station ground,[3] from the slipperiness of stairs leading to the station;[4] from allowing articles to

steps the injury for which this action was brought happened. Defendant also produced evidence to the effect "that there was plenty of room to get on and off the trains from the platform; and that there was no necessity for any one to go down these steps to get on. Before leaving trains always draw up in front of the passenger depot and stop to take on passengers. The accident happened fifteen or twenty minutes before the leaving time of the train. The steps are not intended or used for passengers to get on the trains."

The defendant asked the court to give the following instructions, viz.:

"1. If the jury believe from the evidence that the defendant, at the time of the alleged injury at the station at Cedar Rapids, was provided with a safe and suitable platform in front of and adjacent to the passenger rooms of said station, so that passengers could safely and conveniently pass from said room to the trains, and that passenger trains stopped at said platform for the purpose of receiving passengers, and if said plaintiff, in attempting to get upon said train by a different and unusual way and at a different and unusual place, met with said accident, then the plaintiff is not entitled to recover in this action.

"2. That if the plaintiff, Margaret McDonald, attempted to enter said

[1] Patten v. Chicago, etc., R. Co., 32 Wis. 524; Nicholson v. Lanc. & Yorkshire R. Co., 34 L. J. (Exch.) 84; Birkett v. Whitehaven Junc., 4 H. & N. 730; Martin v. Gt. Northern R. Co., 16 C. B. 180; Cornman v. Eastern Counties R. Co., 4 H. & N. 781; Toomey v. London, etc., R. Co., 3 C. B. (N. S.) 146; Foy v. London, etc., R. Co., 18 id. 225.

[2] McDonald v. The Chicago, etc., R. Co., *ante*.

[3] Burgess v. R. Co., 95 Eng. Com. Law, 923.

In Tobin v. Portland, Saco & Portsmouth R. Co., 59 Me. 183, the liability of railroad companies to persons coming to their stations upon business, and not as passengers, for injuries caused by defects in station platforms was adjudicated, and it was held that a hackman could recover of a railroad company for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in the platform negligently left in a defective condition. It is the well-settled rule that railroad companies are bound to keep their platforms and landing places safe and convenient for all who make use of their cars as a means of conveyance. But it is not so clear what the liability of the company is, in this respect, to persons not passengers. But APPLETON, C. J., in delivering the opinion of the court in this case, said: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other. The hackman is there in the course of business; but it is a business important to and for the convenience and profit of defendants. The general principle is well settled that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he is induced to pass, for a lawful purpose, by an invitation, express or implied, can recover damages for the injury sustained against the individual so inviting and being in fault for the defect." Barrett v. Black, 56 Me. 498; Carleton v. Franconia Iron and Steel Company, 99 Mass. 216. From the general duty which railroad companies owe to persons thus apparently invited, such as friends and companions of passengers, porters and hackmen, it would seem that they are responsible for injuries resulting from a neglect of that duty in respect to platforms, station approaches, etc.

[4] Davis v. London, etc., R. Co., 2 F. & F. 588.

stand or lie upon the platform obstructing and endangering travel over it, as a switch handle;[1] and generally the company is bound, as to its passengers or persons upon its premises "by invitation," to see to it that its premises are in such a condition, *in all respects*, that a person in the exercise of ordinary care can leave them without injury, and this extends to and embraces proper and suitable platforms, steps and walks, as well as suitable lights.[2]

train at a place not prepared or designed by the defendant for receiving passengers on trains, there being no paramount necessity for so doing, and in making such attempt she received the said injury, then her own fault contributed to the same, and the plaintiff cannot recover.

"3. The liability of the defendant as a common carrier did not commence as to the plaintiffs until the train which they were to take was drawn up to the usual place for receiving passengers, unless they were directed by some authorized agent of defendant to go upon the train at another and different place or before the train reached the usual place."

Each of these was *refused*, and the defendant excepted.

The court, after referring to the issues made by the pleadings, charged the jury as follows:

"The principal question for you to determine is, by whose fault or negligence did the accident occur? If one of the steps was loose and not nailed down, by reason of which the accident happened, it is such a want of care as would render the defendant liable, unless you find that the accident happened, or was contributed to, by the want of ordinary care and prudence on the part of the plaintiff. It is for you to determine from the evidence whether the plaintiff used ordinary care and prudence in leaving the depot and going to the cars by the way and at the time she did, and by ordinary care is meant such care and prudence as an ordinarily prudent person would exercise under like circumstances. If you find that an ordinarily prudent person would not have gone down the steps of the platform where the accident occurred, but would have waited until the passenger cars were opposite the passenger depot, then the defendant is not liable. And if you find that the plaintiff went by a way which was not used or traveled over by passengers to enter the cars, and that a person of ordinary prudence would not have gone by that way, you may fairly infer that there was a want of ordinary care on her part. Passengers must exercise ordinary care in approaching and entering the cars. If, however, you find that the defendant backed its train up to the place where it stood when the accident happened; that persons could conveniently and safely approach the train where it then stood but for the defective step, and there was no rule or regulation of the company prohibiting persons from approaching the cars by that way, and that an ordinarily prudent person would have approached the train by that way, the defendant is liable, if the accident occurred by reason of the defective step."

The defendant excepted to this charge, and it was fully sustained on appeal by the supreme court of Iowa.

Actions have been upheld for injuries resulting from defective depot, floors. Liscombe *v.* Jersey, etc., R. Co., 6 Lans. (N. Y.) 75; from defective platforms. Tobin *v.* Portland, etc., R. Co., 59 Me. 183; Seymour *v.* Chicago, etc., R. Co., 3 Biss. (U. S. C. C.) 43; McDonald *v.* Chicago, etc., R. Co., 26 Iowa, 124; and generally for injuries resulting upon their premises without the fault of the passenger, from defects thereon, or obstructions thereon. Burgess *v.* Railroad Co., 95 Eng. Com. Law, 923.

[1] Martin *v.* Great Northern Railway Co., 16 C. B. 179.

[2] Cornman *v.* Eastern Co. Railway Co., 4 H. & N. 781.

In Beard *v.* Conn. & Pass R. Co., 48

SEC. 541. **Duty of railroad corporations.** — The trains must also be stopped at the station so that passengers can alight upon the platform, and if they are stopped at any other place, and the station is called, so that passengers are required, or have a right to understand that they are required to stop there, the company is liable for injuries received in leaving such place, to the same extent and upon the same ground that it would be liable for injuries received by the defectiveness of its own premises.[1]

Vt. 101, the plaintiff was at the defendant's depot for the purpose of taking the train. There was a platform extending from the east side of the depot to the track over which passengers passed in going to and from the cars. There were stairs leading through the center of the depot to the street on the opposite side which was several feet lower than the track, and there were also stairs at either end of the depot, leading from the platform to the street. The stairs at the north end of the depot were open at the top, and there was nothing to indicate that they were not for the use of passengers. In fact they were built by and were intended for the sole use of the express company, but they were on the defendant's premises. The plaintiff in attempting to pass down these stairs in the dark from the upper platform to the street, *without fault on her part*, fell from the lower platform to the ground and was injured. It was held that the defendant was responsible for the injury

[1] Columbus, etc., R. Co. *v.* Farrell, 31 Ind. 408; Memphis, etc., R. Co. *v.* Whitfield, 44 Miss. 466.

In Delamatyr *v.* The Milwaukee, etc., R. Co., 24 Wis. 578, the plaintiff received an injury while descending from the defendant's train at Hanover Junction, as was alleged, by reason of the defendant not having furnished a safe and proper means of descent. The train consisted of only two cars, of which the one in the rear was the ladies car, and the other a gentleman's car, immediately in front of which was a baggage car. When the train stopped at the junction the plaintiff was seated in the ladies' car. *By direction of the brakeman* she passed through the gentleman's car to the car platform at its front end, for the purpose of descending them. The steps attached to this platform had not been drawn up opposite to the station walk or platform. The platform was only a few inches above the rail, and nearly two and a half feet below the lower car step, and was over three feet from the rail horizontally. The plaintiff could not reach the station platform, by stepping down in the usual manner, but was obliged to jump some distance obliquely. The ground immediately opposite the steps was muddy and slanted away rapidly from the ends of the ties, so as to make a kind of pit, unsuitable for a landing place. The sister of the plaintiff had got off at this point, safely, immediately before the plaintiff attempted to do so. The plaintiff descended to the lower step holding a sunshade and basket in one hand, and her skirts with the other, hesitated, and made some remarks about the impracticability of alighting there, but being encouraged by her sister, took the hand of the latter and sprang for the platform. As she sprang, her skirts caught upon a part of the brake, and she fell in such a way that her head and shoulders and a considerable portion of her body rested upon the station platform, and in the fall, broke her arm. No officer or employee of the company was present to aid her in alighting. Under this state of facts it was held that the plaintiff was entitled to recover. In commenting upon the question whether the plaintiff, under the circumstances, was guilty of such contributory negligence as would prevent a recovery by her, COLE, J., very pertinently said: "As a matter of law, to characterize this conduct of hers as careless and negligent, would seem to be manifestly un-

So, too, it is the duty of the company to stop its train at a station long enough to give all passengers desiring to stop there time to get out of the cars, and failing to do so, if a passenger while the cars are in motion, but before they have acquired *rapid* motion, jumps from the cars and is injured, the company is liable therefor.[1]

warranted," and it was left for the jury to say, whether in fact the conduct of the plaintiff was so negligent as to estop her from a recovery.

A similar doctrine was held in Robson *v.* The N. E. R. Co., L. R., 10 Q. B. 271, where a passenger of a railway is invited to alight at a spot where there is no platform, so that usual means of descent are absent, the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting. Plaintiff, a female, was a passenger by defendant's railway to B., a very small station; on the arrival of the train at the station the engine and part of the carriage in which plaintiff was riding were driven past the end of the platform, which is short, and came to a standstill, the door of the plaintiff's compartment being beyond the end of the platform. Upon the train stopping, plaintiff rose and opened the door, and stepped on to the iron step; she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavoring to get the other foot on to the footboard she lost her hold of the carriage door, and slipped, and fell, and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff, *held*, first, that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the defendants had failed in their duty toward the plaintiff, and had not provided a reasonable substitute for a platform. Also, that the jury might not improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were, therefore, liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty. And that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff.

In Indianapolis R. Co. *v.* Farrell, 31 Ind. 408, the train ran beyond the platform where passengers were usually landed and stopped over a culvert, and the railroad hands, whose duty it was to announce the stations, announced the station. The plaintiff, without fault on his part, in getting off from the train (it being so dark that he could not see where the train was), fell into the culvert and was injured, and it was held that he was entitled to recover.

[1] Filer *v.* N. Y. C. R. Co., 49 N. Y. 47; Loyd *v.* Hannibal, etc., R. Co., 53 Mo. 509; Illinois Cent. R. Co. *v.* Able, 59 Ill. 131.

"It is the duty of railway passenger carriers," say the court in *McDonald* v. *Chicago, etc., R. Co., ante,* "to provide comfortable rooms for the accommodation of passengers, while waiting at stations, and to enforce such regulations, in regard to smoking therein, as to enable passengers to occupy them in reasonable comfort. If this is not done, it will afford reasonable excuse for passengers to enter the cars before they are drawn up in front of the platform in preparation for immediate departure. And, if in so doing a passenger sustains injury through a defect in the platform, against or opposite which the cars are standing, * * * the company will be held responsible. Railway passenger carriers have power to make reasonable rules and regulations, in regard to the conduct of passengers, extending to the time and mode of entering the cars; but such rules and regulations must, in some way, be made known to passengers, or they will not be in fault for not conforming to them." It was, accordingly, held, in this case, that the female plaintiff, who found the passenger room unfit for occupation, by reason of tobacco smoke and other impurities, and attempted to enter the cars which had not yet been drawn up to the platform, and was injured by the giving away of the steps at the end of the platform, was entitled to recover. DILLON, C. J., laid down the following rule as applicable to all cases of injury

But it seems that no recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them. Damont *v.* N. O., etc., R. Co., 9 La. Ann. 441; Jeffersonville, etc., R. Co. *v.* Hendricks, 26 Ind. 228; R. Co. *v.* Aspell, 23 Pa. St. 147; Gavett *v.* Manchester, etc., R. Co., 16 Gray (Mass.), 501; and under such circumstances it is not sufficient to charge the company that the conductor advised the passengers to make the attempt. It is the duty of the passenger to exercise his own judgment, and if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars a recovery. Chicago, etc., R. Co. *v.* Randolph, 53 Ill. 510; Jeffersonville, etc., R. Co. *v.* Swift, *ante;* Chicago, etc., R. Co. *v.* Hazzand, 26 Ill. 373.

When the danger is apparent it must not be braved simply because the company is bound to stop the train, or because it is very important that the passenger should stop at that particular time. The company, in such case, is bound to respond in damages for its breach of duty in not stopping, *but is not liable for injuries received by the passenger in attempting to leave when it is dangerous for him to do so.* Georgia R. Co. *v.* McCurdy, 45 Ga. 288.

But in all cases the question of liability must necessarily be determined by the facts and circumstances of each case. Whether the train was in rapid motion, whether the train was started while the passenger was attempting to leave, and whether the real danger was obvious. Jeffersonville R. Co. *v.* Hendricks, *ante.* But see Burrows *v.* Erie R. Co., 3 T. & C. (N. Y.) 44, in which it was held that no recovery could be had where the injury was brought about by the action of a person not in the employ of the company.

about stations and in entering cars: "Railway companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers, or those who have purchased tickets, with a view to take passage on their cars, would naturally or ordinarily be likely to go."[1]

SEC. 542. Railway companies are bound to bring their trains to a halt at places convenient for passengers to alight.[2] In *Cockle* v. *Southeastern Railway Company*, *ante*, it appeared that the car in which the plaintiff rode, being the last car, remained about four feet from the platform when the train had stopped, and the plaintiff,

[1] Barges *v.* R. Co., 95 Eng. Com. L. 923; Martin *v.* R. Co., 81 id. 179.

In Shepperd *v.* The Midland Railway, 20 W. R. 705, the plaintiff, while waiting for the train, it being cold, walked back and forward on the platform in front of the station, and slipping on a strip of ice, fell, dislocating his shoulder. Held that he could recover.

In Caswell *v.* Boston & Wor. R. Co., 98 Mass., it was held that where a passenger had stepped upon the platform in front of the station to wait for a train, and by the negligent misplacement of a switch, an engine appeared to be approaching directly toward the platform, and the passenger had cause to apprehend danger, and, while running to avoid it, was injured, the company was liable.

In Longmore *v.* G. W. Ry. Co., 115 Eng. C. L. 183, it appeared that a railway company, for the more convenient access for passengers between two platforms of a station, erected across the line a wooden bridge which the jury found to be dangerous. Held, that the company were liable for the death of a passenger through the faulty construction of the bridge, although there was a safe one, about one hundred yards further around which the deceased might have used.

In Cockle *v.* S. E. Railway Co., 27 L. T. (N. S.) 320, a railway train in which the plaintiff was a passenger, on arriving at the station of the plaintiff's destination, was drawn up with the body of the train alongside the platform, but with the last carriage, in which the plaintiff rode, opposite a receding part of the platform, at which persons could not alight — a space of about four feet intervening between it and the train. Arriving trains were not usually drawn up at this spot, but at a point farther on, where the platform was well lighted with gas lamps. It was a dark night, and there were no lamps lighted near the place where the plaintiff's carriage stopped. No express invitation to the passengers to alight, and no warning of danger in alighting was given by the company's servants, but the train had come to a final standstill. The plaintiff opened the door of her carriage, stepped out, and fell, and thereby sustained injuries in respect of which she brought her action against the company. Held, by the court (affirming the judgment of the court of comman pleas, and following Præger *v.* The Bristol and Exeter Railway Co., 24 L. T. R. [N. S.] 105), that the action was maintainable; for the leaving a carriage which has been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant a passenger in believing that it is intended she shall get out, and that she may, therefore, do so with safety, without any warning of her danger, amounts to negligence on the part of the company, for which, at least in the absence of contributory negligence on the part of the passenger, an action may be maintained.

[2] Delamatyr *v.* Railroad Co., 24 Wis. 518.

in attempting to alight, believing she was about to step on the platform, fell, in consequence of the insufficiency of light at that point, and was injured. Held, that plaintiff could recover. In this case, COCKBURN, C. J., said: "An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence, * * * and it appears to us that the bringing up of a train to a final stand-still, for the purpose of the passengers' alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station."[1]

Reasonable time for leaving the cars should be allowed, and if the time-tables do not allow sufficient time for all passengers, whether young or old, to leave the cars in safety, and an injury

[1] Præger v. The Bristol and Exeter Railway Co., 24 L. T. Rep. (N. S.) 105, was a case exactly similar, and the plaintiff recovered.

In Colorado & Indiana Central Railroad Co. v. Farrell, 31 Ind. 408, where the train passed beyond the platform and stopped, leaving one of the cars over a culvert, the conductor announcing the name of the station, and a passenger in attempting to alight was injured by reason of darkness and not being able to see where the car was, the company was held liable. Whittaker v. Manchester & Sheffield R. Co., Law Rep., 5 C. P. 464, note 3 was a case precisely similar, and the plaintiff was allowed to recover. But in Bridges v. North London R. Co., 24 L. T. Rep. (N. S.) 835; L. R., 6 Q. B. 377, it was held that where a passenger alighted from the last car of a train, while such car was standing in a tunnel in the vicinity of a station, a recovery could not be had for the death of the passenger in consequence, there being no evidence that the train had come to a final stand-still, or to a place where the company designed the passenger should alight.

See, also, Siner v. Great Western Railway Co., Law Rep., 4 Ex. 117.

In Frost v. Grand Trunk Railway Co., 10 Allen, 387, it was held. that "if a railroad train is stopped at night. merely for the purpose of allowing a train, which is expected from the opposite direction, to pass by, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and walks into an open cattle-guard, and receives personal injury thereby, cannot maintain an action against the company to recover damages therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house, supposed to have been reached by the train, or that the train was near a passenger station, which was not the place of his destination."

In Forsyth v. Boston, etc., R. Co., 103 Mass. 510, where a passenger, on alighting from a car at night. instead of walking along the platform to the end steps, voluntarily stepped off the side into a cattle-guard, although knowing where the highway crossed the railroad track. it was held that he was not in the exercise of due care, and could not recover for injuries thus occasioned.

is thereby occasioned, the company will be liable.[1] But sick persons, and persons unable to take care of themselves should provide themselves with proper assistants while traveling in railroad cars; and if a person is sick and unable to walk without assistance, thereby requiring longer delay at the station than usual, he should give timely notice to the conductor.[2]

Passengers at intermediate stations, where trains stop for refreshments, have the same rights in reference to safe egress and ingress and proper station accommodations and platforms as at the termini of the passage.[3] But the rights of the passenger while a train is stopping at an intermediate station for the purposes of the railroad alone, and not for the refreshment of the passenger, are not so extended.[4]

From the decisions it is apparent that passengers are allowed considerable latitude in traveling by railroad; that the responsibility of railroad companies is made commensurate with the general duties which they owe the passengers, such as safe, convenient and comfortable modes of ingress and egress from trains, platforms, station approaches and passenger rooms; and that the application of the rules of law, both in this country and in England, has been thus far characterized with a due regard both for the rights of the railways and the public.

In an action against a railroad company, for injuries, resulting from attempting to leave the train when in motion, an important element in the case is, whether the train was in fact stopped

[1] Railroad Company v. Baddeley, 54 Ill. 19; 5 Am. Rep. 71.

[2] New Orleans, etc., R. Co. v. Statham, 42 Miss. 607. In Illinois Central R. Co. v. Slatton, 5 Am. Rep. 109; 54 Ill. 133, it appeared that the train upon which the passenger was traveling, having stopped at a station, remained a reasonable time for passengers to alight, but he, not availing himself of the opportunity, waited until the train began to move, when, in attempting to leave the cars, he was fatally injured. Held, that the company was not liable, there being no proof of mismanagement of the train or careless conduct of the employees.

[3] McDonald v. Chicago & N. W. R. Co., *ante*.

[4] Frost v. Grand Trunk R. Co., *ante*. In State v. Grand Trunk R. Co., 4 Am. Rep. 258; 58 Me. 176, the rule was laid down that a passenger on a railway, who purchases a ticket for a distant station and gets off the train temporarily, and without notice, invitation or objection, while it is stopping at an intermediate station, dees no illegal act, but, for the time, he surrenders his place and rights as a passenger; but he may return and resume his place and rights as a passenger on the train before it starts, and the officers of the railway are bound to give reasonable notice of the starting of the train.

a sufficient time, reasonably, to enable the passengers to get off. If so, it cannot be said to have been guilty of negligence in the management of its train, and no recovery can be had.[1] In the last cited case, the court held that the defendant was entitled to an instruction, that "if the train had stopped a sufficient time to enable the plaintiff to leave it safely, and had then again started on its course, and passed the platform, and the plaintiff then left the platform of the car while the train was in motion, rather than be carried by, he was guilty of carelessness and could not recover for the injuries sustained by him;" also, that "if the defendant stopped its train a sufficient time to allow the plaintiff to leave it safely, it was not guilty of negligence." The train must be stopped a sufficient time reasonably to enable all persons desiring to stop at the station to do so, and the question as to whether it did so in a given case is one of fact for the jury.[2]

SEC. 543. **Injuries received in getting upon a train.** — The same duty and the same rule of liability exists on the part of a railroad company, in reference to stopping its trains sufficiently long to enable passengers to get on to it. Generally, it may be said, a person attempting to get aboard a train while it is in motion, is guilty of such contributory negligence as will bar a recovery for an injury received while attempting to do so. And the fact that pressing business requires that he should take the train, *or any other excuse*, will not excuse his negligence, or entail the consequences thereof upon the company. *If he was in fact guilty of contributory negligence, although the company was also negligent*, no recovery can be had.[3] But while, as previously stated, generally, an attempt to get aboard a train in motion will be treated as evidence of negligence *per se* on the part of the passenger, yet, instances may exist when it is not so, and the passenger is justified

[1] Davis v. Chicago, etc., R. Co., 18 Wis. 175.

[2] Pennsylvania, etc., R. Co. v. Kilgore, 32 Pa. St. 292; Paulk v. S. W. R. Co., 24 Ga. 356; Illinois, etc., R. Co. v. Statton, 54 Ill. 123; Lampeth v. North Carolina R. Co., 66 N. C. 494; Evansville, etc., R. Co. v. Duncan, 28 Ind. 441; Lloyd v. Hannibal, etc., R. Co., 53 Mo. 509; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292; Fairmount, etc., R. Co. v. Statler, 54 id. 375; Toledo, etc., R. Co. v. Baddesley, 54 Ill. 19; Southern R. Co. v. Kendrick, 40 Miss. 374; Inhoff v. Chicago, etc., R. Co., 20 Wis. 344.

[3] Habner v. New Orleans, etc., R. Co., 23 La. Ann. 492; Keating v. N. Y. C. R. Co., 3 Lans. (N. Y.) 469; Knight v. Pontchartrain R. Co., 23 La. Ann. 462.

in making the attempt, but in such cases, liability arises if at all because of the fact that the danger was not obvious;[1] or because the agents of the company directed the passenger to make the attempt.[2] But, even where the agents of the company *direct* the passenger to do so, the company is not liable, *if it was gross negligence on the part of the passenger to make the attempt, in view of all the circumstances*, and whether it was so or not, is a question for the jury.[3]

SEC. 544. **Accommodations — contributory negligence.** — A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that passengers are *compelled to ride upon the platform*, it is liable for injuries received by them while riding there,[4] but for injuries received while *unnecessarily* riding there the company is not responsible,[5] nor while passing from one car to another unnecessarily.[6] The fact that the conductor *permits* a passenger to ride upon the platform, when there is no necessity for his doing so, does not render the company liable for injuries received by him; no person has a right to charge another with the consequences of his own negligence, simply because such persons permitted him to do the act.[7] In all cases, when questions of liability under such circumstances arise, it is a question for the jury whether the plaintiff was guilty of such contributory negligence as will prevent a recovery, and this must be determined in view of all the facts, and if upon the whole it is found that the negligence of the company was the proximate cause of the injury, the fact that the plaintiff was negligent in being where he was will not prevent a recovery.[8]

[1] Curtis *v.* Detroit, etc., R. Co., 27 Wis. 158; Johnson *v.* Westchester, etc., R. Co., 70 Pa. St. 357.

[2] Detroit, etc., R. Co. *v.* Curtis, 23 Wis. 152.

[3] Phillips *v.* R. & S. R. Co., 49 N. Y. 177; Curtis *v.* Detroit, etc., R. Co., *ante*.

[4] Willis *v.* Long Island R. Co., 34 N. Y. 670.

[5] Hickey *v.* Boston, etc., R. Co., 14 Allen (Mass.), 429; Quin *v.* Ill. Cent. R. Co., 51 Ill. 495.

[6] Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

[7] Higgins *v.* N. Y. & Harlem R. Co., 2 Bosw. (N. Y.) 132.

[8] Zemp *v.* Wilmington, etc., R. Co., 9 Rich (S. C.), 84; Edgerton *v.* N. Y. & Harlem R. Co., 35 Barb. (N. Y.) 389; Sheridan *v.* Brooklyn, etc., R. Co., 36 N. Y. 39; Willis *v.* Long Island R. Co., 34 id. 670; Clark *v.* 8th Ave. R. Co., 36 id. 135; Meesel *v.* Lynn, etc., R. Co., 8 Allen (Mass.), 234. So for injuries received while riding in the baggage car, if by consent of conductor. O'Donnel *v.* Alleghany R. Co., 50 Pa. St. 490. So where a pas-

SEC. 545. **Duty to passengers — implied obligations.** — Not only is a railroad company or other carrier of passengers bound to exercise proper care to prevent injury to its passengers *while upon its premises, in going to or from its trains, but it is also bound to exercise reasonable care and diligence in protecting them from insults or injury from other passengers, while riding thereon, as well as from its own servants.* It is not held to the same degree of care in this respect as it is held to in the selection of the agencies of its business, but it is bound to exercise that degree of care that a prudent man would exercise under similar circumstances in the conduct of his own business. The mere fact that one passenger is injured by an assault committed by another does not of itself even constitute a *prima facie* cause of action, but if it is also shown that the person who committed the injury *was improperly admitted upon the train*, being *drunk and disorderly at the time;* or *was improperly permitted to remain there because of his riotous or improper conduct after he got upon the train*, the company is liable for all the consequences.[1]

senger leaps from the car to avoid injury, if the danger was such as to justify the step, the company is responsible for the consequences. S. West. R. Co. *v.* Paulk, 24 Ga. 356; R. Co. *v.* Aspell, 26 Pa. St. 167; Frink *v.* Potter, 17 Ill. 406; Eldridge *v.* Long Island R. Co., 1 Sandf. (N. Y.) 89. So for injuries received from sudden movements of the train, either in starting or stopping. Stimson *v.* N. Y. Cent. R. Co., 32 N. Y. 333; Gordon *v.* R. Co., 40 Barb. (N. Y.) 546; Brown *v.* N. Y. Cent. R. Co., 32 N. Y. 597.

[1] Goddard *v.* Grand Trunk Railway Co., 57 Me. 202; 2 Am. Rep. 39; Railroad Co. *v.* Finney, 10 Wis. 388; Moore *v.* Railroad Co., 4 Gray (Mass.), 465; Ramsden *v.* Boston and Albany R. Co., 104 Mass. 117; 6 Am. Rep. 200; Phila. & Reading R. Co. *v.* Derby, 14 How. (U. S.) 468; Sherley *v.* Billings, 8 Bush (Ky.), 147; 8 Am. Rep. 451; Bryant *v.* Rich, 105 Mass. 180; 8 Am. Rep. 311; Holmes *v.* Wakefield, 12 Allen (Mass.), 580; Duggins *v.* Watson, 15 Ark. 118; Passenger R. Co. *v.* Young, 31 Ohio St. 518; 8 Am. Rep. 78; Railroad Co. *v.* Blocher, 27 Md. 277; Nieto *v.* Clark, 1 Clifford (U. S. C. C.), 145; Flint *v.* Trans. Co., 34 Conn. 554; Seymour *v.* Greenwood, 7 H. & N. 355; Railroad Co. *v.* Vandiver, 42 Pa. St. 365; Landreaux *v.* Bel, 5 La. (O. S.) 434; Railroad Co. *v.* Hinds, 53 Pa. St. 512; The Atlantic and Gt. Western R. Co. *v.* Dunn, 19 Ohio St. 162; 2 Am. Rep. 382; The Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; 2 Am. Rep. 373; Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116; 10 Am. Rep. 103; Craker *v.* The Chicago and North Western R. Co., 36 Wis. 657; 17 Am. Rep. 504; Chamberlain *v.* Chandler, 4 Mas. (U. S.) 242; Stephen *v.* Smith, 29 Vt. 190; Railroad Co. *v.* Anthony, 43 Ind. 183; Bayley *v.* Railroad Co., L. R., 7 C. P. 415; Coleman *v.* R. Co., 106 Mass. 160; Maroney *v.* R. Co., id. 153; Brand *v.* Railroad Co., 8 Barb. (N. Y.) 368; Weed *v.* Panama R. Co., 17 N. Y. 362.

In Brand *v.* Railroad, 8 Barb. 368 the court say: "A passenger on board a stage-coach or railroad car, and a person on foot in the street, do not stand in the same relation to the car-

SEC. 546. The liability of a railroad company to its passengers is predicated upon a different ground from its liability to its own or servants' agents, or others who do not occupy that relation to it. The rule is, that where a person or corporation by contract or statute is bound to do certain things, they are absolutely responsible for the manner in which the duty is performed, and cannot excuse themselves from liability because they have committed the duty to others who were believed to be possessed of superior qualifications for performing such duties. Mr. Wood, in his Law of Master and Servant (pp. 645–652), in commenting upon this question, says: "He is bound to discharge his legal obligation to the latter, and if he commits this duty to another, he does it at his peril."[1] For instance," he adds, "and to illustrate the application of the rule, a carrier of passengers for hire — as a railroad company — by the sale of a ticket, or the receipt of the price for transportation from one point to another expressly contracts to carry such person to the point covered by the contract. In addition to that, the law *impliedly* raises a contract on his part to carry such person safely, so far as human foresight can guard against disaster; to carry him in the usual and ordinary mode, incident to such travel; to treat him respectfully, and protect him, so far as due care on his part can do so, from injury from other persons riding by the same conveyance. These are among the *implied* obligations imposed, and they are absolute duties that cannot be shirked or evaded, and for a failure in the observance of which he is liable to the passengers whether such failure results from his own act or the act of those to whom

rier. Toward the one the liability of the carrier springs from a contract, express or implied, and upheld by an adequate consideration. Toward the other he is under no obligation but that of justice and humanity. Hence a passenger who is injured by a servant of the carrier may have a right of action against him, when one not a passenger, for a similar injury, would not.

In Meyer *v.* Second Av. R. Co., 8 Bos. (N. Y.) 305, affirmed 17 N. Y. 362, a passenger who was wrongfully expelled from the platform of a car by the defendants' servants was held entitled to recover damages for the same. So, where a person is rightfully expelled, if excessive force is used, or an improper place is selected, liability attaches. Hibbard *v.* R. Co., 15 N. Y. 455; Hilliard *v.* Goold, 34 N. H. 230; Johnson *v.* Concord R. Co., 46 id. 213; Sandford *v.* Eighth Av. R. Co., 23 N.Y. 343; Terre Haute, etc., R. Co. *v.* Vanatta, 21 Ill. 188; Stephen *v.* Smith, 29 Vt. 160.

[1] Goddard *v.* Grand Trunk Railway Co., 57 Me. 202; 2 Am. Rep. 39; Railroad Co. *v.* Finney, 10 Wis. 388; Moore *v.* R. Co., 4 Gray (Mass.), 465.

he committed the duty.[1] In a Pennsylvania case[2] this question was ably considered. In that case an action was brought for an injury to the plaintiff's wife by the fighting of passengers among themselves. It appeared that drunken and quarrelsome men intruded themselves into the ladies' car in large numbers at one of the stations, and a fight ensued, during which the plaintiff's arm was broken. In passing upon the question of liability of the railroad company therefor, WOODARD, C. J., said:

[1] In R. Co. *v.* Finney, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor. In Seymour *v.* Greenwood, 7 H. & N. 355, a passenger was assaulted and put out of the defendant's omnibus by one of its servants. In Moore *v.* Railroad Co., 4 Gray (Mass.), 465, the plaintiff, a passenger, was forcibly expelled from the defendants' train by the conductor, and in all these cases the company was held responsible. So, in Railroad *v.* Vandiver, 42 Pa. St. 365, a passenger received injuries, of which he died, by being thrown from the platform of a railroad car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defense that if the passenger's death was the result of force and violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company) the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent and humane men. In the present case the company and its agents were all liable for the injury done to the deceased."

In Weed *v.* Railroad, 17 N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured was willful. The court held the willfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress.

In Railroad *v.* Derby, 14 How. 468, where the servant of a railroad company took an engine and run it over the road for his own gratification, not only without consent, but contrary to express orders, the supreme court of the United States held that the railroad company was responsible.

In Railway *v.* Hinds, 53 Pa. St. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held responsible, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate, by an earnest effort, that it was impossible to do so.

In Flint *v.* Transportation Co., 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for $10,000.

In Landreaux *v.* Bel, 5 La. (O. S.) 434, the court say that carriers are responsible for the misconduct of their servants toward passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases.

In Chamberlain *v.* Chandler, 3 Mason, 242, Judge Story declared, in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment.

[2] Pittsburgh & Fort Wayne R. Co. *v.* Hinds, 53 Pa. St. 503.

"There is no such privity between the company and the disorderly passenger as to make them liable on the principle of *respondeat superior*. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action; it can rest upon no other. The negligence of the company or of their officers in charge of the train is the gist of the action, and so it is laid in the declaration. And this question of negligence was submitted to the jury in a manner of which the company have no reason to complain. The only question for us as a court of error, therefore, is whether the case was, upon the whole, one that ought to have been submitted. The manner of the submission having been unexceptionable, was there error in the fact of submission?

"The learned judge reduced the case to three propositions. He said the plaintiff claims to recover,

"1st. Because the evidence shows that the conductor did not do his duty at Beaver station, by allowing improper persons to get on the cars.

"2d. Because he allowed more persons than was proper under the circumstances to get on the train, and to remain upon it.

"3d. That he did not do what he could and ought to have done to put a stop to the fighting upon the train which resulted in the plaintiff's injury.

"As to the first of the above propositions, the judge referred the evidence to the jury especially with a view to the question whether the disorderly character of the men at Beaver station had fallen under the conductor's observation so as to induce a reasonable man to apprehend danger to the safety of the passengers.

"The evidence on this point was conflicting, but it must be assumed that the verdict has established the conclusion that the

In Nieto *v.* Clark, 1 Clifford, 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge CLIFFORD declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. Railroad *v.* Blocher, 27 Md. 277

conductor knew that drunken men were getting into the cars. Let it be granted also as a conclusion of law that a conductor is culpably negligent who admits drunken and quarrelsome men into a passenger car. What then?

"The case shows that an agricultural fair was in progress in the vicinity of Beaver station; that an excited crowd assembled at the station rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, and that the man who commenced the fight sprung upon the platform of the hindmost car after they were in motion.

"Of what consequence, then, was the fact that the conductor knew these were improper passengers? It is not the case of a voluntary reception of such passengers. If it were, there would be great force in the point, for more improper conduct could scarcely be imagined in the conductor of a train than voluntarily to receive and introduce among quiet passengers, and particularly ladies, a mob of drunken rowdies. But the case is that of a mob rushing with such violence and in such numbers, upon the cars, as to overwhelm the conductor as well as the passengers.

"It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration.

"When passengers purchase their tickets and take their seats they know that the train is furnished with the proper hands for the conduct of the train, but not with a police force sufficient to quell mobs by the wayside. No such element enters into the implied contract. It is one of the incidental risks which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter.

"These observations are equally applicable to the second proposition. The conductor did not 'allow' improper numbers, any more than improper characters, to get upon the cars. He says he took no fare from them, and in no manner recognized them as passengers. To allow undue numbers to enter a car is a great wrong, almost as great as knowingly to introduce persons of improper character, and, in a suitable case, we would not hesitate to

chastise the practice severely. But this is not a case in which the conductor had any volition whatever in respect either to numbers or characters. He was simply overmastered; and the only ground upon which the plaintiff could charge negligence upon the company would be in not furnishing the conductor with a counter force sufficient to repel the intruders. This was not the ground assumed by the plaintiff, and it would scarcely have been maintainable had it been assumed. Taking the case as it is presented in the evidence, we think it was error for the court to submit the cause to the jury on these two grounds. But upon the third ground we think the cause was properly submitted. *If the conductor did not do all he could to stop the fighting, there was negligence.* Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and, if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the firemen, all the brakemen, and such passengers as are willing to lend a helping hand, and it must be a very formidable mob, indeed, more formidable than we have reason to believe had obtruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. He should have stopped the train and hewed a passage through the intrusive mass until he had expelled the rioters, or have demonstrated, by an earnest experiment, that the undertaking was impossible."

SEC. 547. **Liability for willful wrongs of agents.** — In a Maine case,[1] the liability of a railway company for an injury inflicted

[1] Goddard *v.* Grand Trunk, etc., R. Co., 57 Me. 202.

upon a passenger by one of its servants was discussed. In that case it appeared that the plaintiff was a passenger in the defendant's train, and that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterward approached the plaintiff, and, in language coarse, profane and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and, shaking it violently, told him not to *yip*, if he did, he would *spot* him; that he was a damned liar; that he never handed him his ticket; that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done any thing to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterward produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct. Upon this evidence the defendants contended that they were not liable, because the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them; that "the master is not responsi-

ble as a trespasser, unless, by direct or implied authority to the servant, he consents to the unlawful act."

"The fallacy of this argument, when applied to the common carrier of passengers," said WALTON, J., "consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insult of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible.

"And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal and profane. The best security the traveler can have that these servants will

be selected with care is to hold those by whom the selection is made responsible for their conduct."

Still further on in the course of his opinion, he summarizes the rule of liability thus: "The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passengers shall have this degree of care. In other words, the carrier is conclusively presumed, we say *conclusively* presumed, for the law will not allow the carrier, by notice or special contract even, to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages."

The liability of a carrier of passengers for insults inflicted upon its passengers was ably discussed in a Wisconsin case.[1]

In that case the plaintiff, a young lady, was a passenger upon the defendants' road, and, for a portion of the way, was the only passenger in the car, and while so pursuing her journey the conductor of the train, without her consent, forcibly kissed her. In an action against the railroad company, to recover for the injury, a verdict for $1,000 was rendered in her favor, which was sustained upon appeal. RYAN, C. J., remarking upon the question whether the master is generally liable for the willful or wanton acts of his servant, said: "However that may be in general, there can be no doubt of it in those employments in which the agent performs a

[1] Craker *v.* The Chicago & N. W. R. Co., 36 Wis. 657; 17 Am. Rep. 504.

duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegates it to an agent, and the agent fails to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance to a third person, without responsibility for the malicious conduct of the substitute in the performance of the duty. If one owe bread to another, and appoints an agent to furnish it, and the agent, of malice, furnishes a stone, instead, the principal is responsible for the stone and its consequences."

"If," says Mr. Wood (Law of Master and Servant, p. 648 *et seq.*), "a carrier of goods for hire should commit the carriage of the goods to a servant, and the servant should steal them, or wantonly destroy them, or, through his negligence, injure, or suffer them to be injured, there is no question but that the master would be liable therefor,[1] and it would be a singular rule, and an absurd one, that did not hold the carriers of passengers, intrusted not only with their comfort, but the safety of their persons, and their lives, during the journey, to as strict performance of this duty as of the other, and it will be seen by an examination of the cases that they are. They are bound to look out for the comfort of their passengers, and, as far as possible, save them from annoyance.[2] This rule has been held to extend to cover an implied stipulation that such carriers are bound to protect passengers against "obscene conduct, lascivious behavior, and every immodest and libidinous approach,[3] and this has been held to amount to a contract duty. In the language of STORY, J.:[4] 'It is a stipulation not for toleration, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evil without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that

[1] Alden v. Pearson, 3 Gray (Mass.), 342; Klauber v. Am. Ex. Co., 21 Wis. 21; Am. Ex. Co. v. Sands, 55 Pa. St. 140.

[2] Day v. Owen, 5 Mich. 520.

[3] Nieto v. Clark, 1 Cliff. (U. S.) 145.

[4] Chamberlain v. Chandler, 3 Mas. (U. S.) 242.

immodesty of approach that borders on lasciviousness, and that wanton disregard of the feelings which aggravates every evil.' In commenting upon the rights and duties of carriers of passengers, SHAW, C. J.,[1] said: 'An owner of a steamboat or railroad is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests, yet he is not only empowered, *but he is bound* so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and, of course, he has a right, and is bound to exclude from his premises all disorderly persons not conforming to the regulations necessary and proper to secure such quiet and good order."[2]

From these brief extracts from the opinions of eminent jurists, as well as from an examination of the cases referred to in the notes to this section, it will be seen that, in all cases where the master owes a duty to third persons, or the public, he cannot shirk or evade it by committing its performance to another, but is bound absolutely to perform the duty, and is liable for a failure so to do, in any respect, whereby injury results to others, whether such failure results from the negligence or from the willful, wanton, or criminal conduct of the agent to whom the duty is committed.[3] This rule was well illustrated in the case referred to in the last note. In that case the plaintiff, with his wife, took passage on the defendants' train, and, through the willful conduct of their conductor and servant, the train was detained over night in an unhealthy locality, and the passengers were thereby exposed to great dangers and hardships. The plaintiff's wife, in consequence of such exposure and hardships, was taken ill during the night and suffered greatly. In an action to recover for the injury, the defendants were held liable, notwithstanding the injury arose from the willful act of the conductor, the court very properly holding that the defendants were bound to discharge their contract with the plaintiff absolutely, and could not defend upon the ground that they had committed its performance to an

[1] Com. v. Power, 7 Metc. (Mass.) 601.

[2] See, also, Markham v. Brown, 8 N. H. 523.

[3] Weed v. Panama R. Co., 17 N. Y. 362.

agent, who had wantonly disregarded the duty. In reference to the application of this rule, so far as railroad companies and carriers of passengers are concerned, it may be said that they are not only bound to protect their passengers against injury and unlawful assault by third persons riding upon the same conveyance, so far as due care can secure that result, but they are bound absolutely to see to it that no unlawful assault or injury is inflicted upon them by their own servants. In the one case their liability depends upon the question of negligence, whether they improperly admitted the passenger inflicting the injury upon the train,[1] while in the other, the simple question is, whether the act was unlawful, and the question of negligence is not an element of liability.[2] In a Massachusetts case[3] the plaintiff was a passenger upon the defendant's steamboat from Boston to Gardiner, Maine, and while upon the trip he was unlawfully assaulted by the steward of the boat and some of the table waiters. In an action to recover for the injuries, the plaintiff had a verdict for $8,000 which was upheld on appeal, CHAPMAN, J., remarking: "As a general rule, the master is liable for what his servant does in the course of his employment; but, in regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do. The reason is that, in respect to such matters, he is not a servant.[4] If, therefore, any of the officers or men, connected with the running of the defendants' boat, had met the plaintiff in the street or elsewhere, in a position wholly disconnected with their duties to the defendants, and committed an assault and battery upon him, it is clear that the defendants would not have been liable.

"There are two views which may be taken in the present case. One is the view which was taken by the court in *Philadelphia and Reading Railroad Co.* v. *Derby.*[5] The plaintiff in that action was riding gratuitously, and the court held that the company were liable to him, not on the ground of a contract

[1] R. Co. v. Hinds, 53 Pa. St. 512; Stephen v. Smith, 29 Vt. 160.

[2] Goddard v. Grand Trunk Railway, *ante*; Sherley v. Billings, *ante*; Bryant v. Rich, *ante*.

[3] Bryant v. Rich, 106 Mass. 180; 8 Am. Rep. 311.

[4] Aldrich v. The Boston & Worcester R. Co., 100 Mass. 31.

[5] 14 How. 468.

between the parties, but because he was injured by their carelessness when he was where he had a lawful right to be. But as the plaintiff in this case was a passenger for hire, we think it better to consider what the contract was between them. This has been discussed in the following cases.[1] It has also been thoroughly discussed in *Goddard* v. *Grand Trunk Railway*.[2] These cases were cited by CLIFFORD, J., in *Pendleton* v. *Kinsley*, Rhode Island Circuit, June, 1870, not yet reported, and the terms of the contract for carriage by water are well stated by him in conformity with the authorities, as follows: 'Passengers do not contract merely for ship-room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance. In respect to such treatment of passengers, not merely the officers, but the crew, are the agents of the carriers.' In *Chamberlain* v. *Chandler*,[3] cited above, STORY, J., says: 'That kindness and decency of demeanor is a duty not limited to the officers, but extends to the crew.'

"The interpretation of the contract of the carrier, which is given in the cases above cited, is not unreasonable. It is not more extensive than the necessities of passengers require. Nor is it difficult to perform. The cases in which it is violated by servants, even of the lowest grade, on board a ship or engaged in the management of a railroad train, and the carrier rather than the passenger ought to take the risk of such exceptional cases, the passenger being necessarily placed so much within the power of the servants.

"In this case, the servants who committed the wrong, being the steward and table waiters, were those who were engaged in providing meals, waiting on the tables and collecting the pay for meals. They were treating the plaintiff's relative with gross

[1] Chamberlain v. Chandler, 3 Mas. 242; Nieto v. Clark, 1 Cliff. 145; Baltimore & Ohio R. Co. v. Blocher, 27 Md. 277; Pittsburgh, Fort Wayne & Chicago R. Co. v. Hinds, 53 Pa. St. 512; Simmons v. New Bedford, Vineyard and Nantucket Steamboat Co., 97 Mass. 361, and 100 id. 34; Milwaukee & Mississippi R. Co. v. Finney, 10 Wis. 388.

[2] *Supra*, 57 Me. 202; 2 Am. Rep. 39.

[3] 3 Mason, 242.

rudeness in connection with this business, and the plaintiff interfered only by a remark that was proper, whereupon the assault was committed. It was not as if a quarrel had occurred on shore and disconnected with the duties of persons on shipboard. It violated the contract of the defendants, as to how the plaintiff should be treated by their servants, who were employed on board the ship and during the passage. For a violation of such a contract either by force or negligence, the plaintiff may bring an action of tort, or an action of contract."

SEC. 548. **Liability of railroad corporations for delay in running trains.** — A railroad company is held chargeable with damages for delay in the running of its trains according to schedule time, and any person sustaining damage from a failure on its part to run its trains *upon such time* is entitled to recover the same.[1] By issuing its

[1] Sears *v.* Eastern R. Co., 14 Allen (Mass.), 433.

In England the same doctrine is held; thus in Buckmaster *v.* The Great Eastern Railway Co., 23 Law J. Rep. (N. S.) Exch. 471, an action was brought for damages sustained by the plaintiff by reason of the company not starting a train as advertised in their time bills, and in which the plaintiff obtained a verdict, Baron MARTIN said: "That it was mere nonsense for companies to say, as, in effect, the company in that case had said, 'We will be guilty of any negligence we think fit, and we will not be responsible;'" and with respect to the notice in this case the learned judge of the Marylebone county court thus concludes: "I am of opinion that it is ultra vires so far as it professes to attach to the right of traveling on their own line the condition that the company will not be responsible for any short-comings of their servants not amountingto willful misconduct, whatever that term may mean." In this view as to the invalidity of the stipulation in question I fully concur. It seems to me to be a monstrous proposition that the railway companies, who are bound by their special Acts and the Railway Clauses Consolidation Act, 1845, section 86, to carry passengers at rates fixed within certain limits, should be able to affix to their contracts with the passengers a stipulation which, if valid, would deprive the passengers of their common-law right to the performance with due diligence of the company's contract with them. There is one other remark I would wish to add, viz., that the restrictions as to the company's liability for not corresponding with other trains contained in the notice and regulation in question only extends to cases where their trains fail to correspond with trains of other companies and not with other trains of their own, which is the present case. Having stated my opinion as to the liability of the company at common law and of the invalidity of the above notice and regulation so far as it restricts such liability in the present case, it still remains for me to consider the last point raised by the defendants, viz.: Whether, if the notice and regulation were valid, and the plaintiff was bound by it to show willful misconduct on the part of the defendants' servants, he has shown it in the present case; in other words, whether the absence of the porters through their own fault, or by the orders of superior servants of the company, was, under all the circumstances of the present case, in point of law, 'willful misconduct,' and I think with some doubt that it ought to be so held, and on this point I wish to

time tables it is treated as contracting with its passengers that its trains shall leave and arrive at its stations at the time named therein, and failing to perform in this respect it is chargeable with the damages that ensue in consequence thereof.[1] It may change its schedule time, but, as to the holders of season tickets, it is bound to give reasonable notice of such change, and a mere advertisement of such change in public journals, or posting notice thereof in its stations or cars, is held not sufficient to relieve it from liability.[2]

The company is liable even though the delay resulted from the willful acts of its servants.[3] The issue of a time table, indicating the time of the arrival and departure of trains, is held to amount to an express promise to run to the places and at the times named, and nothing but accidents resulting from causes which reasonable care could not have provided against, will excuse liability.[4]

refer once more to the judgment of the learned judge of the Marylebone county court in Turner *v.* The Great Western Railway Company, and the authorities therein cited, as to the legal interpretation of the words 'willful misconduct.' The only case that I am aware of that militates against my view is that of Russell *v.* The Great Western Railway Company, before the learned judge of the Bath county court — to whom I have already referred — in which he held that the altered notice or regulation was valid and operative to restrict the defendants, liability to cases of proved willful misconduct on the part of their servants, but from what I have said it will be seen that I cannot concur in his view. Upon the whole, I am in favor of the plaintiff on all the points of law and facts involved in this case, and a verdict will, therefore, be entered for the plaintiff for the amount claimed, with costs, and with liberty to the defendants to appeal within one month.' "

[1] Gordon *v.* Manchester, etc., R. Co., 52 N. H. 596.

[2] Sears *v.* Eastern R. Co., *ante.*

[3] Weed *v.* Panama R. Co., 17 N. Y. 362.

[4] Denton *v.* Great Northern R. Co., 5 El. & Bl. 860.

In Turner *v.* Great Western Railway Company, decided in the Marylebone county court (England), in May, 1874, WHEELER, J., said: "The question of reasonable time is no longer left at large, but is, in fact, fixed by the companies themselves, subject, of course, to accidents which reasonable care could not provide against. In the present case it is quite clear that the absence of porters at the Reading station, which reasonable care might (as far as appears) have prevented, occasioned the detention of the plaintiff at Twyford, and as he was able to procure a conveyance by which he got to Henley, substantially half an hour sooner than the railway company were prepared to convey him by the next train, I think that he was justified in hiring it, and that (subject to the next question) he is entitled to recover its cost against the defendants. The next question which remains for me to consider is, whether the notice and regulation contained in the defendants' tables deprive the plaintiff of his right to recover against the defendants. Now, this notice and regulation as altered came before the learned judge of the Marylebone county court in the case I have already referred to, and he there commented upon it so fully and

SEC. 549. **Liability for negligence in constructing or repairing railroads, and for nuisances.** — A railroad company is bound to exercise ordinary care to prevent injury either to the person or property

so ably that I cannot do better than quote his remarks. Referring to the notice and regulation which came before him in Mr. Forsyth's case, he observes: 'The company's notice of August commenced with these words, 'Every attention will be paid to insure punctuality as far as practicable.' This really is all that the law requires. 'But,' continued the notice, 'the directors do not undertake that the trains shall arrive at the time specified in the time table.' Here I may remark that, irrespective of any notification by the company, the law does not imply any such undertaking, its requisitions being simply that there shall be no failure of punctuality for want of reasonable care and diligence. The notice then adds, 'Nor will the directors be accountable for any loss, inconvenience or injury which may arise from delay or detention;' and subject to their paying every reasonable attention they have expressly fixed on, which, if not so fixed, juries may determine. Before the introduction of railways there were frequently coach proprietors who agreed to perform their promises in so many hours, and, therefore, to use every reasonable means and diligence for that purpose; and if, by reason of their neglect of such means or want of such diligence, they failed to complete their contracts, there can be no doubt that actions must have lain against them. Of course the condition of the roads, which were not under their control, and many other circumstances, and especially sudden accidents, would have been valid defenses to such actions; and, therefore, they were often very difficult to try. Moreover, the proprietors seldom, if ever, entered into these special contracts as to time excepting when there was great competition, and then they used their best endeavors, as did also their servants (who were often stimulated by a system of premiums or fines), to perform these contracts with the greatest exactitude. Actions for the breach of such contracts were consequently very are, and I have not been able to find a report of any case of the kind. In most cases, however, the coach proprietors merely contracted to convey would not be accountable for the consequences of any delay or detention. Since August the notice has been materially changed. The passage about paying every attention to insure punctuality is omitted, and the company expressly promise nothing; but the omission is immaterial, because what they do not promise the law implies against them. The next change is the addition to the stipulation that they will not be responsible for delay, in the words, 'unless upon proof that it arose from the willful misconduct of their servants.' Upon the faith of their present notice, the defendants contend in effect that they are unfettered as to times of starting and arrival, notwithstanding their time tables, in the absence of proof of willful misconduct on the part of their servants. To such a proposition it is somewhat difficult to listen with patience.'"

See, also, Burke *v.* Great Western Railway Co., London Law Jour. for October 24, 1874, in which the court considered the questions involved as to the actual contract of the company and their liability under it. The court said: "I will consider, firstly, the contention of the defendants that the contract between them and the plaintiff was merely to convey him to Henley in a reasonable time, and the contract was not broken by a delay at Twyford, inasmuch as there was another train to Henley at the expiration of an hour which would have conveyed him there in a reasonable time. Now, I at once concede that the contract between the defendants and the plaintiff was to convey the latter to Henley in a reasonable time. Such was the liability of carriers of passengers at common law, and railway companies have only the same liabilities. This is expressly declared by section 89 of the Railway Clauses Act, 1845 (which, I presume, is incorporated in the Great Western Railway Act; at all events, so far as the Henley Branch Railway); but, in-

of any person. Deriving its authority to exercise its functions from the legislature, and its rights being in derogation of private rights, it is bound so to prosecute its business that injury shall not result to others by reason of its own fault or negligence. The same rigid degree of care required to be exercised toward its passengers is not called for, but it must conduct its business as a man of ordinary prudence would conduct a similar business, and whether it has done so or not in a given case is essentially one of fact for the jury,[1] and the question is to be determined in view of the agencies employed, and the consequences of their negligent use or management.[2] In the construction of its road it is liable for all injurious consequences that ensue from a negligent or improper execution of the work. Authority given for the construction of its road does not carry with it authority to construct it in any manner it pleases, but simply to construct it in such a manner as to do the least injury to others.

Mr. Wood, in his treatise upon the Laws of Nuisances (p. 783), has very carefully treated this question, and lays down what we conceive to be the true doctrine warranted by the cases. He says:—

"The question as to how far legislative authority to do an act, which otherwise would be a nuisance, operates to shield those to

dependently of that clause, I do not think that railway companies would be further liable than any other carriers of passengers at common law. What, then, is the liability of carriers of passengers at common law? Simply to use all reasonable means to convey passengers to their destinations in the reasonable times which the passengers to a particular place desire, without specifying any time, and were only bound to perform their contract within a reasonable time, which, as I have already said, was for a jury to determine, regard being had to all the circumstances of the case. Railway companies, on the other hand, have invariably fixed their own times of arrival, and thereby fixed what are reasonable times, and if they fail, from want of due diligence, to perform their contracts, I think that they are clearly liable in the same manner as coach proprietors under similar contracts. *Having the absolute control of their lines, and their lines being less liable to be affected by the weather than the roads, they have in these respects much less difficulty in performing their express contracts than coach proprietors. On the other hand, they are open probably to more numerous and serious accidents as to their engines and carriages than the coach proprietors were as to their coaches and horses. But, however this may be, the effect of weather on the lines and accidents of many kinds will doubtless constitute valid defenses to actions brought against them, as they did against actions brought against coach proprietors under similar circumstances.*"

[1] Davis *v.* R. R. Co., *ante.*

[2] Phila., etc., R. R. Co. *v.* Derby, *ante.*

whom the authority is given, from liability for damages sustained by others therefrom, is one of great importance, and one which has often engaged the attention of courts, and which is now far from being definitely settled.

"It may, however, be stated that a person or corporation authorized by law to do a particular thing, as to build a railroad,[1] a turnpike,[2] a bridge across a navigable stream,[3] or to carry on a particular class of business, as for the manufacture of gas to supply the people of a town or city therewith,[4] so long as they keep within the scope of the power granted, are completely protected from indictment and punishment for a public nuisance, and from proceedings either at law or in equity in behalf of the public therefor.[5] But this is subject to this qualification, *that the nuisance arises as a natural and probable result of the act authorized, so that it may fairly be said to be covered in legal contemplation by the legislature conferring the power.*[6] *If the*

[1] Rex *v.* Pease, 4 B. & A. 30; Rex *v.* Morris, 1 id. 441.

[2] State *v.* Williamstown Turnpike Co., 4 Zabr. (N. J.) 247; State *v.* Clarksville R. & T. Co., 2 Sandf. (Tenn.) 88; Com. *v.* Hancock Free Bridge, 2 Gray (Mass.), 58; State *v.* Scott, 2 Swan. (Tenn.) 332; Beckett *v.* Upton, 33 Eng. L. & Eq. 108.

[3] Jolly *v.* Terre Haute Drawbridge Co., 6 McLean (U. S.), 237; Attorney-General *v.* Hudson River R. Co., 1 Stark. (N. J.) 526; State *v.* Parrott, 71 N. C. 311.

[4] People *v.* Gas-light Co., 64 Barb. (N. Y.) 55; Broadbent *v.* Imperial Gas Co., 7 H. L. 605; Carhart *v.* Auburn Gas-light Co., 22 Barb. (N. Y.) 294.

[5] People *v.* Law, 34 Barb. (N. Y.) 294; People *v.* N. Y. Gas-light Co., 64 id. 55; Carhart *v.* Auburn Gas-light Co., 22 id. 297; People *v.* Platt, 17 Johns. (N. Y.) 195; Davis *v.* Mayor, 14 N. Y. 506; Com. *v.* Reed, 34 Pa. St. 275; Harris *v.* Thompson, 9 Barb. (N. Y.) 350; Rex *v.* Pease, 4 Brad. 30.

[6] In Attorney-General *v.* Bradford Navigation Co., 6 B. & S. 631, the defendants were authorized to construct and maintain a canal, which they proceeded to do in 1774. In 1802 they erected a dam across a stream called Bradford Beck, and made a reservoir of stone at the head of the canal, into which the water was, and held in reserve to supply the canal when the water therein was low. The water thus turned into the canal was impregnated with sewage, and by standing in the canal emitted noxious and unwholesome odors to the nuisance of those living in the vicinity of the canal. This action was brought to restrain the company from turning into this canal any further sewage or other matter calculated to create a nuisance. The defendants admitted that the nuisance existed, but insisted that as they had the right to use the water of Bradford Beck for the purposes of their canal, and that, as they did not pollute the water of the stream or impregnate it with sewage, they could not be made answerable for the nuisance resulting from its use. It appeared that when the canal was built, and down to within three or four years before the commencement of the action, the water of Bradford Beck had been pure, and that the impurity arose from leading into the Beck the sewage from the town of Bradford, which, within a few years, had largely increased in population, so that, although the water was impure, no deposit of an offensive kind took place. The water in the canal was stagnant, and there was no current or flow of water, and the sewage was deposited in the canal, so that when boats passed

nuisance is not the necessary result of the act or work authorized, or if it might be exercised in such a way as to obviate the nuisance, legislative authority will not be inferred from the grant to create the nuisance, and will not operate as a protection or excuse therefor either against an indictment or a suit in behalf of the public at law or in equity to abate the nuisance.[1] Hence it is only when the nuisance is a *necessary* and *probable* result of the act done in pursuance of legislative authority that the grant operates as a protection against indictment or suit therefor. Otherwise it cannot be said to have been contemplated by the grant, and, therefore, is not authorized by it."[2]

The rule seems to be, as stated by Mr. Wood in the same work (p. 784), that "*if negligence can in any measure be predicated of their acts, they are liable for all the consequences resulting therefrom.*" And he proceeds to illustrate this proposition thus: "Where a railroad company are authorized to make excava-

through it it emitted very offensive smells and gases. The court held that although the company was authorized by parliament to construct the canal, and feed it with the water from Bradford Beck, yet, as at that time the water was clear and pure, it could not be held as having been contemplated by parliament that the water would become so impure as to make its use in the canal a public nuisance, and the use of the water was enjoined, as well as a use of the canal in any way so as to create a public nuisance by reason of noxious smells emitted from the water used therein.

[1] Attorney-General *v.* Metropolitan Board of Work, 1 H. & M. 320; Clark *v.* R. Co., 36 Mo. 202, in which it was held that an action would not lie for damages arising from the overflow of land, occasioned by the proper construction of their road-bed. But this applies to only injuries sustained by one whose land is taken and whose damages have been assessed. Attorney-General *v.* Birmingham, 4 K. & J. 528; Imperial Gas Co. *v.* Broadbent, 7 H. L. Cas. 605; Stainton *v.* Woolrych, 23 Beav. 225; Hutton *v.* R. Co., 7 Ha. 259; R. Co. *v.* Archer, 6 Paige (N. Y.), 83; Sandford *v.* R. Co., 24 Pa. St. 378, while companies acting under legislative power are the best judges of the manner in which their works are to be constructed, yet, if they are proceeding to execute them in such a manner as to do unnecessary damage, or inflict unnecessary injury, they are liable therefor. London, etc., R. Co. *v.* Canal Co., 1 Ra. Cas. 225; Coates *v.* Clarence R. Co., 1 R. & M. 181; Rex *v.* East and West India Docks R. Co., 2 Ra. Cas. 380.

[2] See, also, Attorney-General *v.* Bradford Navigation Co., 6 B. & S. 631; People *v.* Gas-light Co., 64 Barb. (N. Y.) 55.

In Clark *v.* Mayor of Syracuse, 13 Barb. (N.Y.) 32, the legislature declared a stream navigable, and afterward authorized the plaintiff to erect a dam upon it. It was held by the court that this authority only protected the plaintiff from the consequences of the nuisance to navigation, and was no protection for nuisances occasioned by the dam in other respects.

In Richardson *v.* Vermont Central R. Co., 25 Vt. 465, it was held that where the defendant in the erection of its railroad made an excavation upon its own land so near to the plaintiff's land adjoining, that his land slid into the excavation, the defendants were liable for the injury, the court holding that their charter gave them no authority to remove the plaintiff's soil.

tions for their road-bed, it is held that *they are bound to make them with reasonable regard to the rights of adjoining owners;* and if they attempt to perform the work without taking reasonable precautions in that regard, a court of equity will restrain them from proceeding until such reasonable precautions are taken.[1] *When the company can exercise its rights in a way that will not be productive of injury to private rights, it is bound so to exercise it,* and a court of equity will always interfere to prevent their exercise in a vexatious or careless way."[2]

If there are two modes in which the work can be done, one of which would create a nuisance and the other not, they are bound to choose the mode that would obviate the nuisance.[3]

[1] Rickett *v.* Metropolitan Railway, L. R., 2 H. L. 175.

[2] R. Co. *v.* Canal Co., 1 Railway Cas. 225.

[3] In the Freehold General Investment Co. *v.* The Metropolitan R. Co., Weekly Notes, 1866, p. 66, the defendants in the construction of their road were building tunnels under valuable houses, and among the rest, under the plaintiff's house. Upon a bill for an injunction to restrain them from proceeding until they had provided proper means for securing the house from further injury — the walls having already begun to crack — the Vice Chancellor in disposing of the question said: "The legislature has given power to the defendants to make their works by means of a tunnel, close to and through the midst of valuable houses, and must have foreseen that some damage would be done. * * * But the company are not only bound to make compensation for the damage sustained, but are bound to prosecute the work skillfully, and, if there are two ways of doing the work, to choose the one that will do the least injury."

In North Staffordshire R. Co. *v.* Dale, 8 E. & B. 836, it was held that a railroad company, having carried a highway over its road by a bridge, was bound at all times not only to keep the bridge in repair, but also all approaches thereto.

In Hamden *v.* N. H. R. Co., 27 Conn. 158, it was held that a railroad company, altering a highway for the purposes of its road, is bound to restore it to its former condition, and that this liability continues until it is so restored, and, until that is done, that it remains a continuing nuisance rendering it liable for all damages, either to the town or individuals.

In Regina *v.* Train, 2 B. & S. 640, an iron tramway laid in a highway so as to cause the wheels of vehicles to skid and to frighten horses, hitting their feet on them, is a nuisance, and that no degree of public benefit will operate as a defense.

In Johnson *v.* Atlantic R. Co., 35 N. H. 569, it was held that it is the duty of a railroad company to construct culverts and ditches sufficiently low to carry off water set back upon lands by the construction of its road, when this can be done without difficulty.

In Sabin *v.* Vermont Central R. Co., 25 Vt. 363, defendant held liable for not removing stones thrown upon land in process of blasting for their road-bed.

In Pittsburgh, etc., R. Co. *v.* Gielleland, 56 Pa. St. 445, it was held that a culvert, so unskillfully constructed as to be insufficient to carry off the water of a stream in ordinary high water, renders the company liable for all injuries resulting therefrom. Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274; Taylor *v.* Grand Trunk R. Co., 48 N. H. 304; Attorney-General *v.* Metropolitan Board of Works, 1 H. & M. 320; and the question of proper execution of the works is a question of fact. Ware *v.* Regents

SEC. 550. **Engines and machinery.**—A railroad company, from its grant to operate the road by steam, does not thereby acquire authority to use engines thereon that are defective in construction so as to scatter coals along the line of its road, endangering the property of those through whose land it passes,[1] nor with smoke-stacks so defectively constructed as to permit the free escape of sparks from its engines, thus exposing property on the line of its road to imminent danger from fire;[2] but in this respect it is bound to adopt the latest improvements in screens or spark protectors, and exercise the highest degree of care to prevent disastrous consequences;[3] and it is held by a very respectable class of cases that the very fact, that a fire results from sparks emitted from the engine, is *prima facie* evidence that the spark protector

Canal Co., 3 De Gex & Jones, 227; Coats v. Clarence R. Co., 1 R. & M. 181.

In Matthews v. West London Water Works Co., 3 Camp. 402, the defendants were authorized to make excavations in the street to lay their water pipes. In doing so they threw up rubbish without properly guarding the same, whereby a stage coach, which the plaintiff was driving, was overturned and injured, and he, plaintiff, severely injured. Lord ELLENBOROUGH held that the company was clearly liable, even though the work was done by a contractor.

In Waterman v. Conn. & Pass. River R. Co., 30 Vt. 610, damages were allowed for injuries from surface water, through the unskillful manner in which the road was constructed. But see Henry v. Vt. Central R. Co., 30 id. 638, where injury to land resulting from change in the course of a river by a railroad company in necessary erection of their road, was held not recoverable, though such erections were unskillfully made. Robinson v. N. Y. & Erie R. Co., 27 Barb. (N. Y.) 512.

It must lay its track skillfully in a public street, and is liable for injuries resulting from unskillfulness in that respect. Worster v. Forty-second Street R. Co., 50 N. Y. 203.

It must not let down the lands of an adjoining owner, whether by skillful or unskillful prosecution of its work. Richardson v. Vt. Central R. Co., 25 Vt.

Authority to erect a bridge over a navigable stream, if the navigation is not impeded, does not authorize it even temporarily to obstruct it while erecting the bridge. Memphis & Ohio R. Co. v. Hicks, 5 Sneed (Tenn.), 427.

In Lawrence v. Great Northern R. Co., 4 Eng. Law & Eq. 265, held liable for not providing proper flood-gates for escape of water, which by erection of its road-bed were prevented from spreading as formerly, even though the act did not provide for their being made.

[1] King v. Morris and Essex R. Co., 18 N. J. Eq. 397; Cleavelands v. Grand Trunk R. Co., 42 Vt. 449.

[2] Bedell v. L. I. R. Co., 44 N. Y. 367; Gandy v. Chicago, etc., R. Co., 30 Iowa, 420; Kellogg v. Chicago, etc., R. Co., 26 Wis. 223; Case v. Northern Cent. R. Co., 59 Barb. (N. Y.) 644; Rood v. N. Y. Cent. R. Co., 18 id. 80; Jackson v. Chicago, etc., R. Co., 31 Iowa, 176; Kansas, etc., R. Co. v. Butts, 7 Kans. 308; Spaulding v. Chicago, etc., R. Co., 30 Wis. 110; Ill., etc., R. Co. v. McClelland, 42 Ill. 355; Huyett v. Phila., etc., R. Co., 23 Pa. St. 373; Fero v. Buffalo, etc., R. Co., 22 N. Y. 209.

[3] It must employ the best precautions in use. Frankford, etc., Turnpike Co. v. Phila., etc., R. Co., 54 Pa. St. 345.

is defective and throws the burden upon the company of proving the contrary.[1]

But there is considerable conflict upon this question, and in several of the states it is held that negligence will not be inferred from the mere fact that a fire is set from sparks.[2] And even in those states where such a presumption is raised, it is held that the presumption may be overcome by slight evidence of diligence in this respect.[3]

SEC. 551. **Application of the maxim, sic utere tuo ut alienum, non lædas.** — The time-honored maxim, *sic utere tuo ut alienum, non lædas*, has the same application to railway companies and other corporations that it has to individuals, qualified in some respects by the grant of authority to it and extended in others because of the dangerous agencies employed and the consequent disaster from their negligent management. The application of this maxim cannot, perhaps, be better illustrated than in the case of fires resulting from the accumulation of dry grass and other combustibles in the vicinity of railroads. Because the company employs fire as one of the agencies of its business, and because by its employment the property of all persons upon its line is placed in peril of being destroyed by fire, it is held bound, at its peril, to exercise great care to prevent such consequences. Thus, it has been held that, if in dry times it permits the accumulation of grass and weeds upon its roadway, and by reason of their ignition fire spreads to adjoining premises, it is liable for the injuries that ensue therefrom,[4] even though the plaintiff has permitted such vegetation to accumulate or grow upon his own land, and that such vegetation is a secondary cause of the damage done thereby. The owners of land adjoining railways have a right to presume that the railway company will discharge its duty, and it is not negligence *per se* on their part to assume that he is not exposed to dangers that can only

[1] Bedell *v.* L. I. R. Co., *ante;* St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335; Case *v.* R. Co., *ante;* Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366; Cleavelands *v.* Gd. Trunk R. Co., 42 Vt. 449.

[2] Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Gandy *v.* Chicago, etc., R. Co., 30 Iowa, 420.

[3] Spaulding *v.* Chicago, etc., R. Co., *ante.*

[4] Webb *v.* Rome, Watertown, etc., R. Co., 49 N. Y. 420; Kellogg *v.* Chicago, etc., R. Co., *ante;* Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Flynn *v.* San Francisco, etc., R. Co., 40 Cal. 14; Ill. Central R. Co. *v.* Nunn, 51 Ill. 78; Fitch *v.* Pacific R. Co., 45 Mo. 322.

occur as a result of a neglect of duty on the part of the company.[1] It is not, perhaps, proper to say that the company is guilty of negligence *per se*, to permit the accumulation of such vegetation and combustible materials along its road, as some of the cases would seem to hold, but it is evidence to go to the jury to establish negligence, and will sustain a verdict, if, from all the facts and circumstances, they shall find it negligence in fact.[2]

So, too, in the use of fuel for its engines, the company is bound to exercise due care, and employ that which is the least likely to produce ill results;[3] and the question as to whether the employment of certain kinds of fuel is negligent, or whether it was negligently used, is for the jury in view of the circumstances.[4]

SEC. 552. **Contributory negligence.** — The question, as to whether the plaintiff has been guilty of such contributory negligence as disentitles him to a recovery, is a question of fact for the jury in view of all the circumstances, as in leaving stubble and dry grass standing in his fields along the track of the railway,[5] and the question is to be determined in view of the circumstances, the uses to which the field is devoted, and as to what is usual and ordinary under such circumstances.[6] It is held in some of the cases, that the owner of adjoining lands, in dry times, is bound to plough around them to guard against the destruction of his property by fires originating from the company's negligence,[7] and that the jury are to say which was the most negligent, the plaintiff or defendant,[8] but this doctrine is not believed to be predicated upon principle or to be consistent with sound public policy. The idea that a person devoting his property to its ordinary and usual purposes, is bound to devote it to some other use, or to devote it to

[1] Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Webb *v.* Rome, etc., R. Co., *ante;* Flynn *v.* San Francisco, etc., R. Co., *ante;* Fitch *v.* Pacific, etc., R. Co., *ante.*

[2] Webb *v.* Rome, etc., R. Co., *ante;* Ill. Central R. Co. *v.* Nunn, *ante;* Fitch *v.* Pacific, etc., R. Co., *ante;* Spaulding *v.* Chicago, etc., R. Co., *ante.*

[3] Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 390.

[4] Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379.

[5] Flynn *v.* San Francisco, etc., R Co., 40 Cal. 14; Ill. Cent. R. Co. *v.* Nunn, 51 Ill. 78.

[6] Kellogg *v.* Chicago, etc., R. Co., 26. Wis. 223.

[7] Keese *v.* Chicago, etc., R. Co., 30 Iowa, 78; Ill., etc., R. Co. *v.* Nunn, 51 Ill. 78.

[8] Ill., etc., R. Co. *v.* Nunn, *ante.* See, also, Field on Dam., ch.

no use at all, because possibly by devoting it to its usual lawful purposes, through the negligence of some other person owning adjoining lands it may be injured, is imposing burdens upon innocent parties, that the law is not accustomed to impose, and, notwithstanding the fact that some courts have seen fit to hold a different rule, there can be no question that that is the soundest and most consistent doctrine, that permits adjoining owners to presume that railroad companies will exercise due care in the management of their business, and that negligence cannot be predicated against him because he relies upon such presumption.[1]

SEC. 553. **Consequential damages.** — For merely consequential damages, from constructing or maintaining their works, where corporations are vested with the right of eminent domain, and the injury is the natural and probable result thereof, no liability exists,[2] except so far as the charter or the statute gives a remedy.[3] But if they are not invested with the right of eminent domain they are liable for injuries resulting to others either from the erection of their works or the prosecution of their business.[4] So, it has been held, that where a corporation is authorized to erect factories and mills, the act does not shield it from liability for injuries resulting from the improper blasting of rocks in excavating to lay the foundation of their buildings;[5] nor where it is authorized to erect and maintain dams, from the injuries resulting to upper owners from the flooding of their lands.[6] So, a religious corporation, having authority to erect and maintain a church, does not thereby acquire the right to maintain unsafe buildings alongside a public street;[7] and so, generally, in all cases, a corporation is liable for any act done by it, or by its agents, within the scope of their authority, precisely the same as an individual is, except so far as the act is fairly covered by the grant of authority to it by the legislature.

[1] Kellogg *v.* Chicago, etc., R. Co., *ante*. See, also, Field on Dam., § 664.

[2] N. Y. & Erie R. Co. *v.* Young, 33 Pa. St. 175.

[3] Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112.

[4] Pottstown Gas Co. *v.* Murphy 39 Pa. St. 257.

[5] Hay *v.* Cohoes Co., 2 N. Y. 160.

[6] Hooksett *v.* Amoskeag Man. Co., 44 N. H. 105.

[7] Church of the Ascension *v.* Buckhart, 3 Hill (N. Y.), 193.

SEC. 554. **Injury to persons and property by running of trains.**— A railroad company, irrespective of any statute, is bound to exercise due care in the running of its trains, and, while it may run its trains at any rate of speed it deems necessary, either at road-crossings or elsewhere, and at common law is not absolutely bound to ring the bell or blow the whistle of its engine, yet, if, in consequence of a neglect on its part to take proper precautions to signal its approach to a highway crossing, a person, in the exercise of due care, himself, is injured, it is liable in damages therefor. It is bound to do no specific act, *but must, at its peril*, do every thing that ordinary prudence requires should be done by it, to prevent injury to parties not in fault. Therefore, while, as previously stated, by the common law there is no absolute duty imposed upon it to signal its approach to a road crossing, *yet, if ordinary prudence required that it should do so, and because of a failure to do that or some other equally effective act to indicate the approach of its trains*, a person in the exercise of due care is injured, the jury may, from its failure in these respects, find it guilty of negligence and it becomes liable for the consequences.[1]

Even where the statute requires that it shall ring the bell or blow the whistle of the engine within a certain distance of a road crossing, a neglect to comply with such regulation is not of itself sufficient to establish its liability for an injury inflicted at the crossing,[2] nor, on the other hand, does a compliance with such statutory requirement necessarily constitute the full measure of its duty in a given case, and absolve it from liability. It is bound to exercise due care, and if, under the circumstances, ordinary prudence required that it should take other precautions, it is bound to do so.[3] It must exercise due care, and as to what *is* due care, is a question for the jury, in view of the circumstances, taking into

[1] Penn. R. Co. *v.* Barnett, 59 Pa. St. 259.

[2] Butterfield *v.* Western R. Co., 10 Allen (Mass.), 532; Spencer *v.* Ill. Cent. R. Co., 29 Iowa, 55; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; North. Penn. R. Co. *v.* Heilman, 49 Pa. St. 60; Galena, etc., R. Co. *v.* Dill, 22 Ill. 264; Warner *v.* N. Y. Cent. R. Co., 44 N. Y. 465; Allyn *v.* Boston and Albany R. Co. 105 Mass. 77; Chicago, etc., Co. *v.* McKean, 40 Ill. 218; Hanover R. Co. *v.* *v.* Coyle, 55 Pa. St. 396.

[3] Richardson *v.* N.Y.Cent. R.Co., 45 N. Y. 846; O'Mara *v.* Hudson R. Co., 38 id. 445; Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269.

consideration the location of the crossing and its surroundings, the situation of the track in reference to the highway, and all the attendant circumstances.[1] Greater caution is required in the streets and at crossings of cities and villages than in rural districts,[2] and at crossings where the track is obstructed or hidden from view of a person approaching it from the highway, than where an approaching train can be seen.[3]

Because the legislature has conferred authority upon the company to build and operate its road across highways, it does not thereby acquire the exclusive right to a free passage which makes it incumbent upon travelers upon the highway to keep off the track at their peril, but its franchise is restricted by public necessity and convenience and must be exercised with due regard thereto,[4] and the rights of the company and of travelers are correlative, and neither has a right superior to the other,[5] and both must exercise due care in the exercise of their respective rights. In order to entitle a person to recover he must show due care on his own part, and a want of due care on the part of the company.[6] The mere fact that the company was negligent, that it omitted to give the signals required by statute, or to take other proper precautions, will not entitle the plaintiff to a recovery, if he was also guilty of negligence contributing to the injury. *The duty of being careful rests upon both, the company and the traveler.* The rule seems to be well established that a traveler approaching a crossing is bound to exercise ordinary care, such care as is fairly commensurate with the nature of the risk. If he can see for a long distance up and down the track *he is bound to look to see whether a train is approaching*, and if the track can only be seen for a short distance, *he is bound to look and listen*, for an approaching train, *and where, by the exercise of the senses of hearing*

[1] West *v.* New Jersey, etc., R. Co., 32 N. J. 91; Milwaukee, etc., R. Co. *v.* Hunter, 11 Wis. 160.

[2] Warner *v.* N. Y. C. R. Co., 44 N. Y. 465.

[3] Mackay *v.* N. Y. C. R. Co., 35 N. Y. 75; Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269; Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482; Milwaukee, etc., R. Co. *v.* Hunter, *ante;* Richardson *v.* N. Y. C. R. Co., *ante;* Allyn *v.* Boston, etc., R. Co., 105 Mass. 77; Brendell *v.* Buffalo, etc., R. Co., 27 N. Y. 534.

[4] Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185.

[5] Galena, etc., R. Co. *v.* Dill, *ante.*

[6] Grippen *v.* N. Y. C. R. Co., 40 N.Y. 34.

and seeing, he might have avoided the injury, no recovery can be had. No person has a right to depend entirely upon the care and prudence of others; but is bound himself to exercise due care, which must be measured by the nature of the risk and the consequences of inattention to his duty. If after having exercised his senses, without hearing or seeing an approaching train near the crossing, he is injured, by reason of the negligence of the company to blow the whistle or ring the bell, or to signal its approach in some equally efficient manner, the company is responsible therefor.[1] Every person is bound to know that a railroad crossing over a highway over which trains are often running is a place of more than ordinary danger, and is bound to exercise a degree of care commensurate therewith,[2] and no presumption can be drawn in favor of the plaintiff, but he must show due care on his part.[3] But if negligence on the defendant's part is established, the court will not presume that the plaintiff was negligent, but will leave it for the jury to say whether there is any evidence of his negligence.[4] He is bound to look out for the crossing, and the fact that he did not see it, or know that he was approaching it, will not excuse him.[5] But if he was a stranger in that section and did not know that there was a crossing over the road, and the company neglected to signal its approach, the rule would be otherwise,[6] as would also undoubtedly

[1] Artz *v.* Chicago, etc., R. Co., 34 Iowa, 153; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Dodge *v.* R. Co., 34 Iowa, 279; McCall *v.* N. Y. C. R. Co., 54 N. Y. 642; Haight *v.* N Y. C. R. Co., 7 Lans. (N. Y.) 11; Gonzales *v.* N. Y. & Harlem R. Co., 38 N. Y. 440; Warner *v.* N. Y. C. R. Co., 44 N. Y. 465; Spencer *v.* Ill. Cent. R. Co., 29 Iowa, 55; Wilcox *v.* Rome, etc., R. Co., 39 N. Y. 358; Wheelock *v.* Boston, etc., R. Co., 105 Mass. 203; Ernst *v.* Hudson R. Co., 39 N. Y. 61; Illinois, etc., R. Co. *v.* Baches. 55 Ill. 379; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Allyn *v.* Boston & Albany R. Co., 105 Mass. 77; Lehigh, etc., R. Co. *v.* Hall, 61 Pa. St. 361; Mackey *v.* N. Y. C. R. Co., 35 N. Y. 75; Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St. 570; Wilds *v.* N. Y. C. R. Co., 29 N. Y. 315; Central R. Co. *v.* Dixon, 42 Ga. 327; Gorton *v.* Erie R. Co., 45 N.Y. 660; Rothe *v.* Milwaukee R. Co., 21 Wis. 256; Eaton *v.* Erie R. Co., 51 N. Y. 545; Mentz *v.* Second Av. R. Co., 3 Abb. App. Cas. (N Y.) 274; Sweeney *v.* Old Colony R. Co., 10 Allen (Mass.), 368; Morse *v.* Erie R. Co., 65 Barb. (N. Y.) 491; Detroit *v.* Van Steinburgh, 17 Mich. 99; Beisiegel *v.* R.Co., 40 N. Y. 9; Baxter *v.* T. & B. R. Co., 41 id. 502.

[2] Ill. Cent. R. Co. *v.* Baches, 55 Ill. 379.

[3] Warner *v.* N. Y. Cent. R. Co., 44 N. Y. 146.

[4] Lehigh, etc., R. Co. *v.* Hall, *ante*.

[5] Allyn *v.* Boston, etc., R. Co., 105 Mass. 77; Butterfield *v.* Western, etc., R. Co., 10 Allen (Mass.), 532; Hanover R. Co. *v.* Coyle, 55 Pa. St. 396.

[6] Hanover R. Co. *v.* Coyle, *ante*; Butterfield *v.* Western R. Co., *ante*

be the case if the injury happened at night, or upon a very foggy day, when, from the darkness or fog, the traveler was unable to see the crossing.[1] If he exercises his senses the best he can, and can neither see nor hear an approaching train, he has a right to presume that none is approaching, because he has a right to presume that the company would discharge its duty by giving the necessary signals.[2] The traveler must use his eyes and ears as a prudent man would do;[3] but if the company has built its track in such a way, or has erected obstructions, or left cars standing in such a manner as to prevent the traveler from seeing an approaching train, he is excused from looking, because the law does not require a person to do a useless act, and if he listens and does not hear the train, he cannot be charged with contributory negligence.[4] But if the proper signals are given, if he ventures upon the track, although he miscalculated as to the chances of crossing, the risk is his, unless negligence in some other respect is chargeable to the company,[5] as if the train is being run at a greatly increased rate of speed.[6] But if a view of the track can be had, the mere fact that no signals of the approach of the train were given will not excuse the traveler from looking and listening.[7] If the company is required by statute or municipal ordinance to keep a flagman at a crossing, or if it has usually done so, to warn travelers of the approach of trains and when it was unsafe to pass, its neglect to do so, or the giving of a false signal by the flagman will render it liable for injuries resulting, although the train is approaching in plain sight.[8] If a person, in the exercise of due care in attempting to cross a railway, through no fault of his gets the wheels of his vehicle caught in the track so that he cannot extricate them in season to avoid an injury, he is not precluded

[1] Hackford v. N. Y. Cent. R. Co., 13 Abb. Pr. (N. S. N. Y.) 18.

[2] Tabor v. Missouri Valley R. Co., 46 Mo. 353; Kennayde v. Pacific R. Co., 45 id. 255; Eagan v. Fitchburg R. Co., 101 Mass. 315; James v. Great Western R. Co., L. R., 2 C. P. 634 *n.;* Kennayde v. Pacific R. Co., 45 Mo. 255.

[3] Nicholson v. Erie R. Co., 41 N. Y. 525; Baxter v. T. & B. R. Co., 41 id. 502.

[4] McGuire v. H. R. Co., 2 Daly (N. Y. C. P.), 76.

[5] Van Schaick v. Hudson R. Co., 43 N. Y. 527; Chicago, etc., R. Co. v. Fears, 53 Ill. 115.

[6] Madison, etc., R. Co. v. Taffe, 37 Ind. 364; Richardson v. N. Y. Cent. R. Co., 45 N. Y. 846.

[7] Gorton v. Erie R. Co., *ante;* Havens v. Erie R. Co., 41 N. Y. 296.

[8] Newson v. N. Y. C. R. Co., 29 N.Y. 383; Sweeny v. Old Colony R. Co., 10 Allen (Mass.), 368; Spencer v. Ill. Cent. R. Co., 29 Iowa, 55.

from a recovery, if by due care on the company's part the injury could have been avoided,[1] and where the railway is carried across the highway in such a manner that a person approaching can neither see nor hear the train distinctly, until too late to avoid the injury, the company is liable.[2] The mere fact that a person sees or hears an approaching train does not preclude him from an attempt to cross if he had ample time to do so, except for the fact that the train was being run at an *unusual* rate of speed. The simple question is whether, *knowing* the usual length of time it took the train to reach the crossing, *as a prudent man*, he was justified in making the attempt.[3] A person is not bound *to stop his team* to look and listen,[4] as is held in Pennsylvania,[5] but is merely bound to do that which is suggested by common prudence in view of the peril to which he may be exposed. If he hears the signal, but does not see the train and does not know the distance at which it is from the crossing, *as a prudent man* there would seem to be no doubt that it would be his duty to wait until it passed, and if he is induced to attempt to pass by reason of a false signal given by a flagman, he cannot be charged with negligence; nor can he be charged with negligence if he knows the distance at which the law requires the signal to be given by the train before it reaches the crossing, but is injured by reason of the unusual speed at which the train is being driven, if, except for that, he would have had ample time to pass, or if the signal was not given as early as it should have been,[6] unless the plaintiff knew, or could have known by the exercise of due care, that the train was being run at an unusual rate of speed.[7] The mere fact that he confidently believed that he had ample time to cross,[8] or that he might have done so except that his horse became frightened does not excuse him. The question is whether he was in

[1] Milwaukee R. Co. *v.* Hunter, 11 Wis. 160; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280.

[2] Richardson *v.* N. Y. Cent. R. Co., 45 N. Y. 846; Gillett *v.* Western R. Co., 8 Allen (Mass.), 560.

[3] Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

[4] Davis *v.* N. Y. Cent. R. Co., 47 N. Y. 400; Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269.

[5] Lehigh Valley R. Co. *v.* Hall, 61 Pa. St. 361; Pittsburg, etc., R. Co. *v.* Dunn, 56 id. 280. But it is now held that the plaintiff is not bound to prove affirmatively that he *stopped* and looked and listened, but that the jury may say *from all the circumstances* whether he exercised due care. Penn. R. Co. *v.* Weber, 72 Pa. St. 27.

[6] Spencer *v.* Ill. Cent. R. Co., 27 Iowa, 55; Havens *v.* Erie R. Co., *ante;* Detroit, etc., R. Co. *v.* Van Steinburg, *ante.*

[7] Langhoff *v.* Milwaukee, etc., R. Co., 23 Wis. 43.

[8] Wilds *v.* Hudson R. Co., 29 N. Y. 315.

such care as a prudent man would have exercised .ne circumstances.[1]

ility of the company depends upon the question the act producing the injury was negligent, and whether aintiff was free from fault contributory thereto, and this tion is for the jury in view of all the circumstances material the issue.[2]

SEC. 555. **Trespassers on the tracks** — The fact that a person is a trespasser on its track does not absolve the company from preventing the infliction of an injury upon him, if possible. They cannot run over a person or cattle or horses upon its track, simply because they have no right there, or because they do not leave the track when signals for that purpose are made; but, as to persons, at least, they have a right to presume that they will obey the ordinary instincts of humanity and self-preservation, and avoid impending danger if possible, but if he exhibits no inclination to do so, *and there is time to stop the train, and it can be done without danger to those upon it*, after it becomes patent that the person or animals will not leave the track, they are bound to stop. What *is* due care under such circumstances is a question dependent upon the facts of each case, and is essentially one for the jury. From *all* the facts and circumstances of the case the jury must say whether the company failed to discharge its duty.[3] In such cases the negligence of the company must be so gross as to imply a disregard of consequences and a willful disregard of duty, and that to such an extent as to entirely overcome the effect of the contributory negligence of the person injured,[4] under the rule that the party guilty of the greatest wrong must be considered the aggressor.[5] But to have that effect, the negligence of the company must be so much greater than that of the person injured, as to clearly preponderate.[6]

[1] Eagan *v.* Fitchburg R. Co., 101 Mass. 315.

[2] McGuire *v.* Hudson R. Co., 2 Daly (N. Y. C. P.), 76; Baltimore, etc., R. Co. *v.* The State, 29 Md. 252.

[3] Finlayson *v.* Chicago, etc., R. Co., 1 Dill. (U. S. C. C.) 579; Stout *v.* Sioux City, etc., R. Co., 2 id. 294; Toledo, etc., R. Co. *v.* Riley, 47 Ill. 408; Brand *v.* Troy, etc., R. Co., 8 Barb. (N. Y.) 368.

[4] Lafayette, etc., R. Co. *v.* Adams, 26 Ind. 76; Illinois Central R. Co. *v.* Hutchinson, 47 Ill. 408.

[5] Macon, etc., R Co. *v.* Davis, 27 Ga. 113.

[6] Chicago, etc., R. Co. *v.* Payne, 49 Ill. 499; State *v.* Manchester, etc., R. Co., 52 N. H. 528; Macon, etc., R. Co. *v.* Winn, 26 Ga. 250.

SEC. 556. **Different rule as to children.**— The same rule as to contributory negligence does not apply to children that is applied to adults, but in actions in their own name, or for their own benefit, their age is to be considered,[1] although in some states it is held that no distinction exists on account of age,[2] and in others, that contributory negligence cannot be imputed to a child, too young to appreciate or comprehend the danger.[3]

But when an action is brought in the name of a parent, no recovery can be had if negligence can be imputed to him in permitting the child to be at large at the place where the injury happened,[4] but the negligence of the parent cannot be imputed to the child.[5] The question whether a railroad company is guilty of negligence for injuries inflicted upon a child is one of fact, to be determined according to the circumstances of each case. It is for the jury to say whether the injury resulted from the omission by the defendant of any duty. If so, liability attaches, if not it does not.[6]

SEC. 557. **Injuries to animals.**— For injuries to animals trespassing upon its track, through no fault of the company, the company is not liable, unless the injury was inflicted through gross negligence of its servants, or willfully,[7] but if the injury was the result of accident [8] or the plaintiff contributed thereto by permit-

[1] Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399; Warner *v.* R. Co., 6 Phila. (Penn.) 537; Railr. Co. *v.* Stout, 17 Wall. (U. S.) 657; Daley *v.* Norwich, etc., R. Co., 26 Conn. 591; Boland *v.* Missouri, etc., R. Co., 36 Mo. 484.

[2] Honegsberger *v* Railr. Co., 1 Keyes (N. Y.), 570; Burke *v.* Broadway, etc., R. Co., 49 Barb. (N. Y.) 529; Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108.

[3] Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Mahoney *v.* Railr. Co., *ante;* Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186; Kay *v.* Penn., etc., R. Co., 65 Pa. St. 269; Glassey *v.* Railr. Co., 57 id. 172.

[4] Jeffersonville, etc., R. Co. *v.* Bowen, 40 Ind. 545; Pittsburg, etc., R. Co. *v.* Pearson, 72 Pa. St. 169; Ihl *v.* 42d St. Railw. Co., 47 N. Y. 317.

[5] Glassey *v.* Railr. Co., *ante;* Daley *v.* Norwich, etc., R. Co., 26 Conn. 591; Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399; Field on Dam., § 195.

[6] Glassey *v.* Railr. Co., *ante;* Kay *v.* Penn. R. Co., 65 Pa. St. 269; Meyer *v.* Midland, etc., R. Co., 2 Neb. 319.

[7] Indianapolis, etc., R. Co. *v.* Petty, 30 Ind. 261; Antisdell *v.* Chicago, etc., 26 Wis. 145; Jackson *v.* R. & B. R. Co., 25 Vt. 150; Quimby *v.* Vt. Central R. Co., 23 id. 387; Pittsburg, etc., R. Co. *v.* Methoen, 21 Ohio St. 586; Tower *v.* Providence, etc., R. Co., 2 R. I. 404; Stearns *v.* Old Colony, etc., R. Co., 1 Allen (Mass.), 493; Knight *v.* New Orleans, etc., R. Co., 15 La. Ann. 105; New Albany, etc., R. Co. *v.* McNamara, 11 Ind. 543.

[8] Garris *v.* Portsmouth, etc., R. Co. 2 Ired. (N. C.) 324.

ting his cattle to run at large, no recovery can be had unless the negligence of the company was gross.[1]

But if by statute the company is required to erect cattle guards at highway crossings[2] or fences to keep cattle off its track, it is liable for injuries resulting from a failure on its part to erect and maintain the same.[3]

But its neglect to erect and maintain fences only inures to the benefits of adjoining owners, or those having cattle upon his premises by his consent, and does not enable one whose cattle have escaped upon his land from the highway or from adjoining premises, to maintain an action.[4] In Missouri it is held that when the statute requires the company to maintain a fence, and it neglects to do so, the adjacent owner is entitled to recover irrespective of the question of negligence.[5]

SEC. 558. We have thus briefly reviewed the liability of railroad corporations for the negligent or wrongful acts of its agents, because such corporations are the most prominent in litigation involving these questions. The same principles apply to *all* corporations with different degrees of intensity, according to the purposes of the corporation, and the consequences of negligent or improper conduct on the part of its agents. Corporations must necessarily act through agents, and the acts of those agents within the scope of their express or implied authority are binding upon them, whether arising out of contracts or tortious acts. The agents, within the line of their duty, are treated as the corporation itself, and the corporation is liable therefor as much as though the officers of the corporation had themselves performed the act. The principal conflict in the cases has arisen mainly from the fact that a proper distinction has not always been taken between the agents of corporations and individuals. In the very

[1] Trow *v.* Vt. Central R. Co., 24 Vt. 487; Hance *v.* Cayuga, etc., R. Co., 26 N. Y. 428.

[2] Bradly *v.* Buffalo, etc., R. Co., 34 N. Y. 427; McDowell *v.* N. Y. C. R. Co., 37 Barb. (N. Y.) 195; Tracy *v.* N. Y. C. R. Co., 38 N. Y. 433.

[3] Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641; Tallman *v.* Syracuse, etc., R. Co., 4 Keyes (N. Y.), 128.

[4] Town *v.* Cheshire, etc., R. Co., 21 N. H. 363; Horn *v.* Atlantic, etc., R. Co., 35 id. 169; Jackson *v.* R. & B. R. Co., 25 Vt. 150. *Contra*, see Browne *v.* Providence, etc., R. Co., 12 Gray (Mass.), 55.

[5] Powell *v.* Hannibal, etc., R. Co., 35 Mo. 457; Bigelow *v.* Northern Mo. R. Co., 48 id. 510.

nature of things corporations can only discharge their functions though agents; that is contemplated by the law creating them, and in the peculiar sphere of his duty each agent, from the highest to the lowest, stands in the place of and represents the corporation. *His acts are the acts of the corporation itself. For all practical purposes as to such duties he is the corporation.* POTTER, J., in a very able opinion in a New York case,[1] which is approvingly cited by Mr. Wood in his Law of Master and Servant, (p. 887,) gives expression to the real distinction. He says: "A corporation cannot act personally. It requires some person to superintend structures to purchase and control the running of cars, to employ and discharge men and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation; they are the executive head or master; their acts are the acts of the corporation; the duties above described are the duties of the corporation. *When these directors appoint some other person than themselves to superintend and perform all these executive duties for them, then such appointee equally with themselves represents the corporation as master in all these respects.*" *The real test of liability is, whether the act was one within the scope of the agent's authority, real or apparent.* Was it an act done in doing that which he was authorized to do and as an incident to it?[2] The principal in all cases takes the risk of all the consequences of a wrongful execution of duties on the part of any person whom he employs *in whatever capacity.*[3]

[1] Brickner *v.* Railr. Co., 2 Lans. (N. Y.) 506, and affirmed, 49 N. Y. 672.

[2] Wood's Law of Master and Servant, chap. 13.

[3] Ramsden *v.* Bost. & Alb. R. Co., *ante;* Passenger R. Co *v.* Young, 21 Ohio St. 518; 8 Am. Rep. 78; Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 131; Limpus *v.* Gen. Omnibus Co., 1 H. & C. 541; Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23; Sherley *v.* Billings, 8 Bush (Ky.), 147; 8 Am. Rep. 541; Howe *v.* Newmarch, 12 Allen (Mass.), 49; Bryant *v.* Rich, 106 Mass. 180; 8 Am. Rep. 311; Jeffersonville R. Co. *v.* Rogers, 38 Ind. 116; 10 Am. Rep. 103; Hewett *v.* Swift, 3 Allen (Mass.), 420; Holmes *v.* Wakefield,1 2 id. 580; Moore *v.* Fitchburg R. Co. 4 Gray (Mass.), 465; Seymour *v.* Greenwood, 7 H. & N. 356; Sanford *v.* Eighth Av. R. Co., 23 N. Y. 343; Goff *v.* Gt. Northern R. Co., 3 El. & El. 672; Poulton *v.* London, etc., R Co., L. R., 2 Q. B. 534; Pickens *v* Diecker, 21 Ohio St. 212; 8 Am. Rep. 55. The master is liable for what his servant does in the course of his employment, but not for acts entirely dis connected with it, for, in the first instance, the act is the act of the mas ter, while in the latter it is the act of the servant. Aldrich *v.* Boston, etc., R. Co., 100 Mass. 31; and the difficulty in determining who is liable is in determining whose act produced the in-

"The question usually presented," says Mr. Wood (Law of Master and Servant, p. 533), "is whether, as a matter of fact, or of law, the injury was received under such circumstances that, under the employment, the master can be said to have *authorized* the act, for if he did not, either *in fact* or *in law*, he cannot be made chargeable for its consequences, because, not having been done under authority from him, *express* or *implied*, it can, in no sense, be said to be his act, and the maxim *qui facit per alium facit per se* does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master expressly conferred, or fairly implied from the nature of the employment and the duties incident to it."[1]

SEC. 558. **Instances of liability for other torts of servants.** — A corporation may be held chargeable for a trespass committed by its servants or agents upon the lands of another;[2] for false imprisonment;[3] for a libel published by its servants;[4] for a nuisance committed by them;[5] for a conversion of the goods of another by them;[6] or for any act done by them within the scope of their authority; but the question of liability always depends upon the circumstance, whether or not the act was within the scope of the servants' authority, express or implied

jury. That is, whether the act is properly chargeable to the master or is purely that of the servant. Bryant *v.* Rich, *ante*. No precise rule for determining this question can be given, and in each case it is a question for the jury in view of the facts and circumstances.

[1] Reedie *v.* London, etc., Railway Co., 4 Exch. 244; Bartonshill Coal Co. *v.* Reid, *post;* Cosgrove *v.* Ogden, 49 N. Y. 255; O'Connell *v.* Strong, Dudley (S. C.), 265; Andrus *v.* Howard, 36 Vt. 248; Luttrell *v.* Hazen, 3 Sneed (Tenn.), 20; Drew *v.* Sixth Av. R. Co., 26 N. Y. 49; Brown *v.* Purviance, 2 H. & G. (Md.) 316; Howe *v.* Newmarch, 12 Allen (Mass.), 49; Southwick *v.* Estes, 7 Cush. (Mass.) 385; Duggins *v.* Watson, 15 Ark. 118; Armstrong *v.* Cooley, 10 Ill. 509; Weed *v.* Panama R. Co., 17 N. Y. 362; Wanstall *v.* Pooley, 6 Cl. & F. 910 *n;* Priester *v.* Augley, 5 Rich. (S. C.), 44; Jones *v.* Glass, 13 Ired. (N. C.) 305; Patten *v.* Rea, 2 C. B. (N. S.) 606; Yates *v.* Squires, 19 Iowa, 26; Goss *v.* Coblens, 43 Mo. 377; Page *v.* Defries, 7 B. & S. 137; Wilson *v.* Peverly, 2 N. H. 548; McKeon *v.* Citizens' R. Co., 42 Mo. 80; Haack *v.* Fearing, 4 Abb. N. S. (N. Y.) 297; Goodman *v.* Kennell, 3 C. & P. 167.

[2] Louisville R. Co. *v.* Faulkner, 2 Head (Tenn.), 65; How. *v.* Canal Co., 5 Harr. (Del.) 245.

[3] Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560.

[4] Aldrich *v.* Press Printing Co., 9 Minn. 133.

[5] Terre Haute Gas Co. *v.* Teel, 20 Ind. 131; Taylor *v.* Boston Wate Power Co., 12 Gray (Mass.), 415.

[6] Beach *v.* Fulton Bank, 7 Cow. (N. Y.) 485.

SEC. 559. **Liability to indictment.** — A corporation is liable criminally for the acts of its agents, when the acts done are within the scope of the authority delegated to the agent. Thus, where the servants or agents of a corporation, in the operations of its works, pollute the waters of a stream,[1] or obstruct a highway,[2] or commit any nuisance that is a legitimate result of doing that which they were employed to do, the corporation, as well as the servants or agents, are liable to indictment therefor.[3] So a corporation may be indicted for an assault committed by its servants,[4] or a libel published by its orders,[5] or for any non-feasance, by the omission by its servants to perform a duty imposed upon it by statute, or by the common law,[6] or for a misfeasance by doing that which they are intrusted to do, contrary to statute, or in violation of the common law.[7] Thus, a turnpike company is liable to indictment for permitting its turnpike to be and remain out of order.[8] So a railroad company authorized to obstruct a highway in a certain mode is liable to indictment for obstructing it in any other mode.[9] And, generally, when the act done is made an offense by statute or the common law, and is within the scope of the powers conferred upon its officer, agent or servant doing it, the corporation is criminally liable therefor.

[1] Rex *v.* Medly, 6 Cr. & P. 437; Regina *v.* Stephens, L. R., 1 Q. B. 701.

[2] Regina *v.* Sheffield Gas Co.; Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.), 523; State *v.* Morris & Essex R. Co., 23 N. J. 360.

[3] Rex *v.* Medly, *ante;* Regina *v.* Stephens, *ante.*

[4] Eastern Counties R. Co. *v.* Broom, 6 Exch. 314.

[5] Whitfield *v.* S. E. Railway Co., E. B. & E. 115.

[6] Regina *v.* Birmingham R. Co., 9 C. & P. 469; Com. *v.* Nashua & Lowell R Co., 2 Gray (Mass.), 54; Regina *v.* G N. of England Railway Co., 9 Q. B. 315.

[7] State *v.* Vt. Central R. Co., 27 Vt. 103; Regina *v.* North of England R. Co., 9 Q. B. 315; Com. *v.* New Bedford Bridge Co., 2 Gray (Mass.), 339.

[8] Red River Turnpike Co. *v.* State, 1 Sneed (Tenn.), 474; Waterford, etc., Turnpike Co. *v.* People, 9 Barb. (N. Y.) 161.

[9] Regina *v.* Scott, 3 Q. B. 543. See, also, § 549 and notes.

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